University of Alberta

Achieving Compliance with the Basel Convention on Transboundary Movement of Hazardous Wastes

by

Ifeoma Martina Onyerikam ©

A thesis submitted to the Faculty of Graduate Studies and Research
in partial fulfillment of the requirements for the degree of

Master of Laws (LL.M)

Faculty of Law

Edmonton, Alberta
Spring 2007

Library and
Archives Canada

Published Heritage
Branch

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque et
Archives Canada

Direction du
Patrimoine de l'édition

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence
ISBN: 978-0-494-29870-1
Our file Notre référence
ISBN: 978-0-494-29870-1

NOTICE:
The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:
L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.

Canada

University of Alberta

Library Release Form

Name of Author: Ifeoma Martina Onyerikam

Title of Thesis: Achieving Compliance with the Basel Convention on Transboundary Movement of Hazardous Wastes

Degree: Master of Laws (LL.M)

Year this Degree Granted: 2007

Permission is hereby granted to the University of Alberta Library to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves all other publication and other rights in association with the copyright in the thesis, and except as herein before provided, neither the thesis nor any substantial portion thereof may be printed or otherwise reproduced in any material form whatsoever without the author's prior written permission.

April 12, 2007

This thesis is dedicated to

the Almighty God, the great fountain that waters and nourishes my life,
and to
my husband, Nnamelugo Basil Okoye.

ABSTRACT

Literature has it that compliance with treaties is generally good. However, there is need for improvement of parties' compliance to ensure that the objectives of a treaty are met. This thesis recognizes that there are problems of compliance with the Basel Convention on transboundary movement of hazardous wastes; hence, the increase in the amount of illegal trade in hazardous wastes. It is argued here that there is need to improve the existing compliance strategy in the Basel Convention on Transboundary Movement of hazardous wastes by the adoption of hard (enforcement) measures as advocated by Downs and soft (managerial) measures as advocated by the Chayeses (collectively "the dual approach"). The efficacy of this dual approach depends on the inclusion of mechanisms such as funding, external and internal monitoring and verification, and sanctions including smart sanctions, modeled on those adopted and applied in the *Montreal Protocol, Kyoto Protocol*, and *CITES.*

ACKNOWLEDGEMENTS

I remain grateful to the Almighty God who saw me through the entire programme and whose immeasurable blessings I cannot do without.

My gratitude also goes to the Faculty of Law, University of Alberta and the Alberta Law Foundation for providing the financial resources and the enabling environment under which this thesis was completed. Thank you Prof. Shannon O'Byrne, Prof. Wayne Renke, Prof. Ted DeCoste, Kim Wilson, Merle Metke and the administrative staff. I thank especially my supervisor, Prof. Elaine Hughes, for her critical review of my thesis and direction in the course of my research. I also thank Prof. Linda Reif for her contributory comments at the beginning of my thesis, and my examining committee – Prof. Cameron Hutchison and Dr. Andy W. Knight - for providing insightful comments.

I thank: my parents, Chief and Lolo B. Osuh, for their love, encouragement and support; my brothers, Okey, Emeka, Chukwudi, Ifeanyi and Ugo; and my in-laws, Ogbuevi and Lolo Andrew Okoye, Dr. Phil Ihejirika, Dr. Chiemeka Ihejirika, Anuli, Chibuzo, and Ngozi. I thank in a special way the love of my life, Nnaluo Okoye, for his love, support, encouragement and comments on this thesis.

To my wonderful friends and colleagues – Barb Marocco, Emem, Nduka, Kelechi, Chike, Olumide, Ubaka, Susan, Dr. Peter Obiefuna and family, Obi Agbarakwe, Remus, Miriam, Sandra, Ada, Jude, and Annet - I say a big "Thank you" for the laughter, joy, love, encouragement and understanding you showed me from the beginning of this thesis to its completion.

TABLE OF CONTENTS

Introduction 1

Part I - The Basel Convention 6

1.1 - History, scope and objectives of the Basel Convention 6

- A. - History 6
- B. - Scope and Objectives.................................... .15

1.2 - Relevant Provisions of the Basel Convention 17

Part II - Compliance 27

2.1 - Theories of Compliance..30

- A. - Rationalist or Utilitarian State-Actor theory 30
- B. - Norm-driven theory.......................................34
- C. - Liberal theory..36

2.2 - Relevance of Theories to Compliance System Design............38

2.3 - Means of achieving compliance..41

- A. - Sanctions...42
- B. - Incentives..46
- C. - Procedural means 49

2.4 - Players in the field of Compliance................................ ...53

Part III- Compliance Mechanisms in Other Environmental Treaties 62

3.1 - The Montreal Protocol 62

3.2 - The Kyoto Protocol 71

3.3 - CITES 77

Part IV- Achieving Compliance with the Basel Convention 82

4.1 - Basel Convention Compliance Mechanism 83

4.2 - Model compliance strategy 87

Conclusion 95

Bibliography 100

LIST OF ABBREVIATIONS

ASIL - American Association of International Law

BAN - Basel Action Network

BCRC - Basel Convention Regional Centres for Technology Transfer

BICC - Bonn International Centre for Conversion

BIDS - Bad Ivory Database System

CITES - Convention on International Trade on Endangered Species of Wild Fauna and Flora

CDM - Clean Development Mechanism

CFC - Chlorine Fluorine and Carbon

COP - Conference of Parties

ECOSOC - United Nations Economic and Social Council

EPA - Environmental Protection Agency

ET - Emissions Trading

EU - European Union

FAO - Food and Agricultural Organization

GATT - General Agreement on Trade and Tariffs

GEF - Global Environmental Facility

GHG - Green house gas

IC - Implementation Committee

ICJ - International Court of Justice

IFAW - International Fund for Animal Welfare

IGO - Intergovernmental Organization

INECE - International Network for Environmental Cooperation and Enforcement

IMDG - International Maritime Dangerous Goods Code

IUCN - International Union for the Conservation of Nature

JI - Joint Implementation

MEA - Multilateral Environmental Agreement

MFN - Most Favoured Nation

MIKE - Monitoring the Illegal Killing of Elephants

NAAEC - North American Agreement on Environmental Cooperation

NAFTA - North American Free Trade Agreement

NCP - Non Compliance Procedure

NGO - Non-governmental Organization

ODS - Ozone Depleting Substances

OECD - Organization of Economic Cooperation and Development

OEWG - Open Ended Working Group

SOLAS - International Convention for the Safety of Life at Sea

SPITS - Special Programme on the Implementation of Targeted Sanctions

TRAFFIC - Trade Records Analysis of Flora and Fauna in Commerce

UNEP - United Nations Environmental Programme

UNFCCC - United Nations Framework Convention on Climate Change

WTO - World Trade Organization

WWF - World Wildlife Fund for Nature

Achieving Compliance with the Basel Convention on Transboundary Movement of Hazardous Wastes

Introduction

The subject of hazardous waste and its effects has engaged the attention of the world over the years. The increase in the quantity of hazardous wastes transported across national borders led to the development of regional and global treaties to regulate trade in, and transfrontier movement of, these wastes. Specific treaties negotiated to regulate the movement of hazardous wastes are: the 1989 *Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal*[1] (a global treaty); the *1991 Bamako Convention*[2] (a regional treaty); and the 1972 *London Convention* (marine disposal).[3] There are also a host of bilateral treaties on the issue of hazardous wastes.[4] Over the years the concern with hazardous wastes has broadened to include the transportation of other dangerous substances (e.g the 2004 *Rotterdam Convention*).[5]

---

[1] March 22, 1989 1673 UNTS 126 online: Basel Convention website < http://www.basel.int/text/text.html > effective May 5, 1992 (hereinafter the *Basel Convention*).

[2] *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa,* January 30, 1991, effective April 22, 1998 online: African Union website < http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/offTreaties_Conventions_&_Protocols.htm >.

[3] *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,* December 29 1972, 11 ILM 1294 (1972) effective August 30, 1975.

[4] Examples are *Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste,* October 28, 1986, T.I.A.S 612 online: Environment Canada website < http://www.ec.gc.ca/tmb/eng/tmbcanusatxt_e.html > (hereinafter Canada-US Agreement) and the *Agreement of Co-operation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances* November 12, 1986, published in Katharina Kummer, *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules* (New York: Oxford University, 1995), appendix VI.

[5] *Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade,* September 10, 1998, 38 ILM 1 (1999) effective February 24, 2004 online: the PIC website < http://www.pic.int/en/ViewPage.asp?id=104 >.

Despite the existence of these treaties on the subject, cases of illegal trafficking in hazardous wastes abound.[6] Such cases indicate that problems exist with parties' compliance with treaties, hence the continued interest in exploring ways of solving this problem of parties' non-compliance. The ultimate goal of this work is to propose an effective and efficient compliance strategy which will ensure parties' improved compliance with the *Basel Convention*. While there is an abundance of literature on the *Basel Convention*, its compliance mechanisms and other aspects of the Convention,[7] there seems to be little literature on improving compliance with the Convention. This thesis fills this void.

Developing and adopting an effective and efficient compliance strategy is important for the success of any treaty, especially one dealing with hazardous wastes.[8]

---

[6] Greenpeace news reports indicate that tonnes of wastes from computer and other metal scraps were continually dumped in China in 2005 and that the hazardous wastes were recycled manually. Pictures of these incidents could be seen on the Greenpeace website <http://www.greenpeace.org/international/photosvideos/photos/piles-of-circuit-boards-from-h > and < http://www.greenpeace.org/international/photosvideos/photos/a-chinese-child-sits-amongst-a ... >. Another case of illegal trafficking is France's illegal shipment of its vessel (Sea Beirut) containing asbestos to Turkey for scrapping in 2002. The contents of the ship were not disclosed to the Turkish owner who bought the ship and neither did the French government take the ship when requested to do so by the Turkish government. See Greenpeace, "Greenpeace Takes French Government to Court for Sending Toxic Ship to Turkey" a Greenpeace news release of July 17, 2002. An INECE newsletter indicates that inspections conducted in European sea ports between September and December 2003, uncovered 20 cases of illegal shipments of hazardous wastes to non-OECD countries and 18 infractions. See Nancy Isarin, "New European Enforcement Initiatives Takes Aim at Major Sea Ports: First Round of Inspections Reveal Illegal Hazardous Wastes Shipments", an INECE newsletter, February 2004 newsletter 9, online: INECE website < http://www.inece.org/newsletter/9/enforcement.html >. David Hackett listed other instances of illegal shipment to include the exportation of hazardous wastes by an Italian waste broker company to Venezuela and Lebanon, the mis-marking of labels of hazardous wastes and its dumping in the ports of Bangkok, and so on. See David P. Hackett, "An Assessment of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal", (1989/90) 5 Am. U. J. Int'l L. & Pol'y 291 at 296.

[7] Jonathan Krueger, "The Basel Convention and the International Trade in Hazardous Wastes" in Olav S. Stokke & Oystein Thommessen, eds., *Yearbook of International Co-operation on Environment and Development* (London: Earthscan Publicatons, 2001/2002) 43; Akiho Shibata, "The Basel Compliance Mechanism", (2003)12:2 RECIEL 183; and David Hackett, *ibid.*

[8] Oran Young noted: "Achieving compliance, in other words, is a necessary condition for international regimes to become successful in the sense of solving or managing the problems that motivate their

Compliance affects the effectiveness of a treaty by inducing a positive behavioral change, which contributes to the achievement of the treaty objectives.[9] Getting States to comply with their treaty obligations is a challenge facing international scholars and international governmental and non-governmental institutions, in their efforts to establish any operable treaty.[10] This thesis examines the potential for the existing compliance mechanism in the *Basel Convention* to be reformulated and built upon by combining elements from the *Montreal Protocol,*[11] the *Kyoto Protocol,*[12] and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[13] (CITES).

In developing this argument, the paper is divided into four parts. Part I contains general information on the *Basel Convention* such as: the history of its development; the scope and objectives of the Convention; and the provisions of the Convention aimed at achieving its objectives. The relevant provisions considered are the

---

creators to establish them". See Oran Young, *Governance in World Affairs* (USA: Cornell University, 1999), 80.

[9] Though compliance affects the effectiveness of a treaty, it is not the sole determinant of treaty effectiveness. For instance, a treaty may record a high compliance rate, example the Montreal Protocol, but the treaty may be regarded as ineffective because it did not induce a change in the behavior of States. See Harold K. Jacobson & Edith Brown Weiss, "A Framework for Analysis" in Harold K. Jacobson & Edith Brown Weiss, *Engaging Countries: Strengthening Compliance with Environmental Accords,* (Cambridge: The MIT, 1998) 1 at 5 (hereinafter Jacobson and Weiss, *Engaging Countries*). See also Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law,* (Canada: Thomson Canada Ltd., 2005) 73.

[10] See George W. Downs, David M. Rocke, & Peter N. Barsoom, "Is the Good News About Compliance Good News About Cooperation" (hereinafter George Downs *et al,* "Good News") in Lisa L. Martin & Beth A. Simmons, eds., *International Institutions: An International Organization Reader,* (Cambridge: MIT Press, 2001) 279.

[11] *Montreal Protocol on Substances that Deplete the Ozone Layer* September 16, 1987, 26 ILM 1550 (1987), effective January 1, 1989 online: UNEP website < http://www.unep.ch/ozone/montreal.shtml > (hereinafter Montreal Protocol).

[12] *Kyoto Protocol to the United Nations Framework Convention on Climate Change* December 11,1997, 37 ILM 22 (1998), effective February 16, 2005 online: UNFCC website < http://www.unfcc.int/essential_background/kyoto_Protocol/background/items/1351.php >(hereinafter Kyoto Protocol).

[13] March 3, 1973, 993 UNTS 243 effective August 1, 1975 online: CITES website < http://www.cites.org/eng/disc/text.shtml > (hereinafter CITES).

provisions: imposing obligations on the parties to the Convention; establishing the institutional framework that ensures parties' compliance; and regulating transboundary movement of hazardous wastes. These provisions are analyzed in such a way as to link parties' non-compliance with the loopholes or the inadequacies of the provisions. Also highlighted are some examples of parties' non-compliance. Except as otherwise indicated, the facts and figures including online information used in this paper are valid up to December 2006.

Part II provides an introductory background to the discussion on compliance. It examines the various theories on compliance, the means of achieving compliance and the players or key actors in the field of compliance. This part also examines the relevance of the theories to a treaty compliance system design. The aim is to develop a conceptual framework for the reformulation of the *Basel Convention*'s compliance system.

Part III examines the compliance mechanisms in the *Montreal Protocol, Kyoto Protocol,* and *CITES.* The first two regimes - the *Montreal Protocol* on ozone protection and the *Kyoto Protocol* on climate change - are chosen because of the transboundary effects of national activities regulated by the treaties and the nature and structure of the non-compliance mechanisms existing in the regimes. While the non-compliance mechanisms in the *Montreal Protocol* are instrumental to the achievement of its objectives, the same could not be said of the *Kyoto Protocol*, as its operation still remains controversial.[14] However, the *Kyoto Protocol* advances some innovative ideas

---

[14] Ronald B. Mitchell, "Institutional Aspects of Implementation, Compliance, and Effectiveness", in Urs Luterbacher & Detlef F. Sprinz, eds., *International Relations and Global Climate Change* (Cambridge: The MIT, 2001) 221 at 226-228.

– such as advocating the adoption of the "managerial" approach to compliance[15] in addition to the "enforcement" approach – which arguably should not be discarded merely because the *Kyoto Protocol* is seemingly unworkable. Though the non-compliance mechanisms in the *Kyoto Protocol* are unprecedented and untested, perhaps they can be used in the *Basel Convention* to increase parties' compliance. CITES is chosen not because of any significant transboundary harm from those activities, but because of the level of compliance and implementation activities currently going on in the regime, which may be relevant to the *Basel Convention*.

An examination of the state of the art on treaty compliance in these regimes aims at showing the effectiveness of the compliance mechanisms set up under these treaties, which could be adopted in the *Basel Convention*. In discussing the state of treaty compliance in the regimes, a brief history of the development of the treaties, the provisions imposing obligations on the parties, and non-compliance structures in the treaties are examined.

Part IV then examines the existing strategy in the *Basel Convention* and suggests a reformulation of the existing strategy by adopting some elements from the three regimes examined. The thesis concludes by contending that an adoption of the proposed strategy will ensure a higher rate of compliance with the *Basel Convention* than is presently the case.

---

[15] This approach involves the adoption of persuasion, capacity building, incentives and so on, to encourage States to comply with their treaty obligations. The approach is built on the foundation that States do not intentionally violate their treaty obligations. The approach is further discussed in part II of this paper.

PART I THE BASEL CONVENTION

As stated in the introduction, the *Basel Convention* is a global treaty negotiated to regulate transboundary movements of hazardous wastes either for recycling or disposal. A thorough understanding of the scope, objectives and provisions of the *Basel Convention* is, therefore, essential to the discussion of parties' compliance with the treaty.

1.1 **History, Scope and Objectives**

A. HISTORY

Prior to 1989, transboundary movements of hazardous wastes were governed by the international law principle of "good neighborliness" or *sic utere tuo, ut alienum non laedas*. This simply means that States have an obligation to control activities within their jurisdiction and ensure that activities within their jurisdiction do not harm the resources of other States.[16] As a general principle, the scope of its application was narrow and there was no enforcement mechanism to ensure compliance.[17] Though this principle over time had developed into a rule of customary international law, the problems associated with the application of customary international law made it difficult for States to rely solely on this rule to regulate transboundary movement of hazardous waste.[18] That was why, in 1981, the Governing Council of the United Nations Environmental Programme (UNEP)[19] mandated a group of officials expert in environmental law to determine subject areas for increased global and regional co-operation for expansion of environmental law.[20]

---

[16] This principle was established in the *United States v. Canada (Trail Smelter Arbitration)* 3 RIAA 1907 (1941) and reaffirmed in Principle 21 of the *Declaration of the United Nations Conference on the Human Environment* June 16, 1972 11 ILM 1416 (1972) online: UNEP website <http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503> (hereinafter Stockholm Declaration) and Principle 2 of the *Rio Declaration on Environment and Development*, June 13, 1992 UN Doc.A/CONF.151/26 (Vol.1) online: UNEP website <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163> (hereinafter Rio Declaration).

[17] Jason L. Gudofsky, "Transboundary Shipments of Hazardous Waste for Recycling and Recovery Operations" (1998) 34 Stan. J. Int'l. L. 219 at 222.

Toxic wastes' transport, handling and disposal were identified as one of the major subject areas for increased international co-operation. One reason for the identification of hazardous wastes as an area deserving international co-operation could be linked to the growing demand by industrialized nations for disposal sites in the developing States, especially in Africa, and the number of accidents from hazardous wastes transportation and disposal that occurred within that decade.[21] The disappearance of landfill sites in the industrialized nations, the escalating disposal costs between the industrialized nations and the converse cheap disposal costs in the developing world and the difficulty of obtaining approval for incineration facilities contributed to the demand for waste disposal in developing States. For instance, in the late 1980s the average disposal cost for one tonne of hazardous waste in Africa was between $US2.50 and $US50, while in the Organization for Economic Co-operation and Development (OECD) countries, it ranged from $US100 to $US2000 per tonne.[22]

A notable example of the illegal disposal of hazardous wastes in Africa was the Koko incident in Nigeria. A Nigerian businessman negotiated with an Italian contractor to store tons of hazardous wastes (containing PCB, dioxins and other cancer-causing chemicals) in farmland in Nigeria under the guise of construction materials. The toxic waste caused premature births, cancer, lung diseases and deaths before it was discovered and cleared.[23]

---

[18] See Patricia Birnie & Alan Boyle, *International Law and the Environment* 2nd ed. (Oxford: Oxford University Press, 2002), 16-17 for a discussion of the problems associated with the application of customary law rule.

[19] UNEP was set up during the Stockholm Conference held on June 5th-16th 1972.

[20] UNEP/GC.9/19A, 9th Session May 26, 1981 recalling Decision 8/15 of the previous year (UNEP/GC.8/15).

[21] See Patricia Birnie & Alan Boyle, *supra* note 18 at 406; Jonathan Krueger, *supra* note 7 at 44.

[22] Jonathan Krueger, *Ibid.*

The Working Group then recommended that guidelines and principles be set up which could lead to a global convention on hazardous wastes within the UNEP framework and in co-operation with international organizations.[24] In order to give effect to the recommendations, the Governing Council in 1982 appointed another group of experts to develop guidelines on environmentally sound transport and disposal of hazardous wastes.[25] The experts met in Cairo and came up with the *Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes* (hereinafter Cairo Guidelines).[26] The *Cairo Guidelines* recommended specific measures, such as the establishment of national authorities within each State to monitor waste disposal activities to be taken by States to ensure environmentally sound management of hazardous wastes.[27] It further recommended that there should be no export of hazardous wastes to any State unless the prior informed consent of that State was obtained.[28]

---

[23] Jason Gudofsky, *supra* note 17 at 220 fn. (8)2.

[24] The recommendations are set out in the Montevideo Programme for the Development and Periodic Review of Environmental Law, which is one of the fundamental policy documents of UNEP. See Katharina Kummer, *supra* note 4 at 38.

[25] UNEP, Governing Council Decision 10/24 of May 31, 1982.

[26] *Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes* UN. Doc. UNEP/WG.122/3 (1985), approved, UN. Doc. UNEP/GC.14/17 (1987). The Governing Council approved the Cairo Guidelines in June 1987. See *Report of the Governing Council on the Work of Its Fourteenth Session,* GCOR, 2nd Sess., Supp. No. 25, UN Doc. A/42/25 (1987), Dec. 14/30 "Environmentally Sound Management of Hazardous Wastes", online: UNEP website < http://www.unep.org/download_file.multilingual.asp?FileID=28 > (hereinafter *Report of the Governing Council on 14th Session*).

[27] Katharina Kummer, *supra* note 4, at 39.

Following the approval of the *Cairo Guidelines*, the Governing Council mandated the Executive Director of UNEP to set up a working group to negotiate a global convention based on the *Cairo Guidelines* and relevant works of national, regional and international bodies and to convene in 1989 a conference for the adoption of the draft convention.[29] The Conference of the Plenipotentiaries on the Global Convention on the Control of Transboundary Movements of Hazardous Wastes was thus convened in Basel from March 20-22, 1989 (hereinafter the Basel Conference). About 116 States were represented. The draft convention was considered and adopted by the parties on March 22, 1989. About 36 States signed the Convention on March 22, 1989.[30]

The *Basel Convention* finally entered into force on May 5, 1992 upon the deposit of the 20th instrument of accession.[31] The delay in the ratification by States could be attributed to several controversies raised during the negotiations. For instance, the African nations (supported by some non-governmental organizations like Greenpeace) were in favour of a complete ban of all transboundary waste shipment, whereas some of the developed nations advocated for regulation rather than a complete ban.[32] Failing to meet their main objectives, the African nations nevertheless insisted on stringent measures, which were accepted by some of the industrialized nations, while others refused and deferred their signatures.[33]

---

[28] *Ibid.*

[29] See *Report of the Governing Council on 14th Session, supra* note 26.

[30] As at May 22, 2006, there are 168 signatories to the Convention. See online: Basel Convention website < http://www.basel.int > under "Status of ratifications".

[31] *Basel Convention, supra* note 1, Art. 25. Australia's ratification brought the Basel Convention into force.

[32] Gudofsky, *supra* note 17 at 225; Katharina Kummer, *supra* note 4 at 43-45.

The refusal by States to adopt a complete ban of transboundary movements of hazardous wastes did not deter the African nations from pursuing, and insisting on, a complete ban.[34] Their efforts yielded fruits in March 1994 when the parties by Decision II/12 adopted the Basel Ban.[35] The Basel Ban aims at banning the transport of hazardous wastes from OECD States to non-OECD States, whether for recycling or disposal.[36] Rummel-Bulska has noted that the purposes of the ban are to provide a "strong incentive to efforts by countries to reduce transboundary movements of hazardous wastes" and to "consolidate policies aimed at treating and disposing of those wastes as close as possible to their source of generation".[37]

The Basel Ban was not incorporated into the text of the Convention thus raising arguments as to its binding effect.[38] In resolving the argument, the Parties by Decision III/1 agreed to amend the *Basel Convention* by inserting the Basel Ban as

---

[33] For instance, all the African states except Nigeria refused to sign the Convention. Also Germany, the USA, UK and Japan deferred their signatures. See Katharina Kummer, *supra* note 4 at 43 - 45. Currently, these States have signed and ratified the Convention with the exception of the USA. The USA has signed but has refused up to the present to ratify the Convention.

[34] Andreas Bernstorff & Kevin Stairs, "POPs IN AFRICA: Hazardous Waste Trade 1980-2000 Obsolete Pesticide Stockpiles", a Greenpeace Inventory prepared for the Conference of Plenipotentiaries on the Stockholm Conference on Persistent Organic Pollutants; Stockholm, Sweden, May 22-23, 2001, online: Greenpeace website < http://www.greenpeace.org/raw/content/international/press/reports/pops-in-africa-hazardous-wast.pdf >, 5-6. See also Jonathan Krueger, *supra* note 7, at 44.

[35] *Report of the Second Meeting of the Conference of Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* March 25, 1994 UNEP/CHW 2/30 online: Basel Convention Website < http://www.basel.int/meetings/cop/cop1-4/cop2repe.pdf >.

[36] See online: Basel Convention website < http://www.basel.int/pub/baselban/html >.

[37] Iwona Rummel-Bulska, "Transboundary Movement of Hazardous Waste", (1994) 4 Y. Int'l Envt'l L. 218, at 219.

[38] See online: Basel Convention website <http//www.basel.int/pub/baselban.html >. Apart from the issue of the Ban Amendment bindingness, some countries opposed the OECD to non-OECD ban on grounds that it is arbitrary as it is based on a country's membership of an economic organization and "because non- OECD countries with environmentally sound and economically viable recycling operations would be penalized by having their access to waste materials from OECD countries cut off, ..." See Jonathan Krueger, *supra* note 7 at 45.

Article 4A to the Convention.[39] Decision III/I constitutes the Basel Ban Amendment. Decision III/1 banned hazardous wastes transportation for disposal and recycling from countries listed in Annex VII (the EU and OECD States) to non-Annex VII countries. It is important to note that recycling of hazardous wastes is included in the list of activities amounting to "disposal operations" in Annex IV of the *Convention.*[40] This simply means that the transportation of hazardous wastes, either for final disposal (in which case, it is not intended for re-use) or for re-use or recycling, is regulated by the Convention. A number of guidelines have been drafted to regulate recycling of wastes. A recent draft is the *Draft Technical Guidelines on the Environmentally Sound Recycling/Reclamation of Metals and Metal Compounds (R4).*[41]

The inclusion of recyclable materials as waste under the Convention has aroused much criticisms over the years on grounds that the inclusion impedes recycling activities, thereby reducing the amount of recyclable wastes available.[42] Also, the inclusion of recyclable materials as wastes leads to a "stigmatization" of such materials.[43] Notwithstanding these criticisms, it is important to regulate fully recyclable wastes in order to prevent sham practices by States. If recyclable wastes are not covered by the *Convention*, parties may mask their hazardous wastes as recyclable wastes and avoid complying with the *Basel Convention*.[44] A typical example occurred in the Khian Sea incident (discussed further in part 1.2) wherein wastes were masked as fertilizer for re-use.

---

[39] *Decision Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention* 22 September 1995 UNEP/CHW.3/35 online: Basel Convention website < http://www.basel.int/meetings/cop/cop1-4/cop3decisions_e.pdf >. This Decision also proposed an amendment to be inserted in the Preamble to the Convention as paragraph 7. The amendment recognizes that transboundary movement of hazardous wastes to developing countries constitutes a high risk of not being managed in an environmentally sound manner as designed in the Convention.

[40] The activities covered range from incineration to storage to recycling. The Annex broadly categorizes wastes into two: those that lead to resource reclamation (Section B) and those that do not lead to resource reclamation (Section A). Section B covers operations such as "recycling/ reclamation of organic substances which are not used as solvents; recycling/reclamation of metals and metal compounds; and Exchange of wastes for submission to any of the operations numbered R1-R11".

[41] UNEPOR, 7th Session of the COP, 7th Meeting held October 25- 29, 2004, UNEP/CHW.7/8/Add.3.

[42] John Thomas Smith II, "The Challenges of Environmentally Sound and Efficient Regulation of Waste: The Need for Enhanced International Understanding" (1993) 5 J. Envt'l . L. 91 at 93.

[43] *Ibid.* at 96. In the words of John Thomas Smith II, "[T]o preserve opportunities for beneficial material recovery and re-use, it is better not to stigmatize recyclable secondary materials as waste, since

Although the Ban Amendment has been incorporated into the *Basel Convention* as Article 4A, it has not entered into force having not received the required number of ratifications.[45] The delay in ratification may be attributed to the possible loss of economic gains from the transactions by the developing world, such as China, India, and the Philippines, that depend economically on the recyclable wastes.[46] The developing countries are attracted by the foreign exchange to be earned from hazardous wastes transactions even though they often do not have the appropriate disposal or recycling facilities.[47] The OECD in one of its working papers summarized the issues:

> The main concern over the effect of the ban amendment raised by some lies in the overall economic and environmental impact of splitting the world market in two as concerns certain recyclable hazardous wastes which are the sources of secondary raw materials for some industries. It has also been claimed that perverse effects may include an increase in the South/South trade, increased final disposal in Annex VII countries rather than recovery; increased

---

doing so is a catalyst for community opposition, transport restrictions, demands for extensive permitting procedures, and the like".

[44] See Hao Nhien Q. Vu, "The Law of Treaties and the Export of Hazardous Waste", (1994) 12 UCLA J. Envt'l. L. & Pol'y 389 at 413 n.140, for a discussion of States' attempts to avoid the provisions of the Convention by tampering with the wastes concentration.

[45] See online: Basel Secretariat website < http://www.basel.int/ratif/frsetmain.php >.

[46] See Jonathan Krueger, *supra* note 7 at 45.

[47] See Jonathan Krueger, *ibid.*

> demand for (often energy- and pollution-intensive) extraction and processing of raw materials ...[48]

Also, there is a perceived conception that the Ban Amendment conflicts with the World Trade Organization (WTO) and the General Agreement on Trade and Tariffs (GATT) Rules[49] and this contributes to the delay in the ratification of the Ban Amendment.[50] These rules seek to remove all barriers to trade, which the Basel Ban seeks to impose. The GATT/WTO Rules require that 'like products' from parties be treated alike (MFN),[51] similar products imported from other countries be accorded the same treatment in terms of internal taxes and regulation as the domestic products,[52] and there should be no quantitative restrictions other than duties and taxes on imported or exported products.[53]

The possibilities of conflicts with the GATT/WTO Rules arise in cases where two countries are WTO members but only one of them is a party to the *Basel*

---

[48] OECD, *Trade Measures in Multilateral Environmental Agreements: A Synthesis Report of Three Case Studies,* OECD Working Papers Vol. VII No. 12, (Paris: OECD, 1999), 25 (OECD, *Trade Measures in MEA)*.

[49] Prior to 1994, the 1947 GATT rules regulated international trade, which emphasized the reduction of all trade restrictions between parties. The 1947 GATT was amended in 1994 and replaced with the 1994 GATT following the establishment of the WTO. What is currently known as the GATT 1994 forms part of the Agreement establishing the WTO. The WTO agreements form the umbrella to which all other agreements concluded during the Uruguay Round of negotiations is annexed. See online: WTO website < http://www.wto.org/english/docs_e/legal_e/legal_e.htm >. See also *Agreement Establishing the World Trade Organization* 1867 UNTS 154 online: WTO website < http://www.wto.org/english/docs_e/legal_e/04-wto.pdf >; *General Agreement on Tariffs and Trade* (GATT 1947), January 1,1948, 55 UNTS 194 online: WTO website < http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf >; *GATT* (1994) 1867 UNTS 187 online: WTO Website < http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf >.These rules are collectively referred to in this paper as the "GATT/WTO Rules".

[50] Jonathan Krueger, *supra* note 7 at 47. See also David A. Wirth, "Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes", (1998) 7:3 RECIEL 237 at 239 and Patti A. Goldman "Resolving the Trade and Environment Debate: In Search of A Neutral Forum and Neutral Principles" (1992) 49 Wash. & Lee L. Rev. 1279 for a discussion.

[51] This is what is known as the "Most Favoured Nation" (MFN) treatment in GATT 1947 as amended by GATT 1994, *supra* note 49, Article 1.

[52] See GATT 1947 (as amended), *supra* note 49, Art. III.

[53] GATT 1947 (amended), *supra* note 49, Art. XI.

Convention or the Basel Ban. In implementing its obligations under the Convention or the Ban Amendment, the Basel Ban member may find it difficult performing its GATT obligations to the Basel Ban non-member.[54] For instance, the application of the Ban Amendment would offend the MFN[55] and quantitative restrictions rules in GATT Articles I and XI.[56] David Wirth has suggested that such conflicts can be resolved using the Article 11 mechanism in the *Basel Convention,* which permits negotiation of bilateral accords.[57] The potential conflict has not been challenged by any State.[58] To the extent that no such conflict situation has been presented for resolution either under the GATT or the *Basel Convention*, the situations at best remain "potential conflict situations" for parties to address their minds.[59]

The *Basel Convention* has undergone further amendments. The absence of provisions on liability and compensation in the Convention, coupled with the concerns expressed by developing countries of lack of funds and technology to combat accidental spills and illegal dumping, led to negotiations on a liability protocol.[60] The necessity for such a liability protocol was based on the provisions of Article 13 of the *Rio Declaration*[61] and the need to provide for third party liability.[62] Negotiations were concluded and parties adopted the *Basel Protocol* on December 10, 1999 at the 5th Conference of the parties.[63] The *Protocol* aims at providing a comprehensive regime of liability and compensation for damage resulting from transboundary movement of hazardous wastes and other wastes. The *Basel Protocol* is not yet in force having not received the required number of ratifications to bring it into force.[64] The delay in ratification could be linked to issues of implementation and costs.[65]

---

[54] David Wirth, *supra* note 50 at 239 – 244.

[55] See fn. 53 *supra.*

[56] David Wirth, *supra* note 50 at 241-244; OECD, *Trade Measures in MEA, supra* note 48 at 32.

[57] David Wirth, *supra* note 50 at 241. *Basel Convention's* Article 11 allows parties to negotiate bilateral, multilateral or regional agreements with parties or non-parties on transboundary movement of hazardous wastes provided that such agreements provide for environmentally sound disposal of hazardous wastes.

[58] OECD, *Trade Measures in MEA, supra* note 48 at 31.

[59] See generally David Wirth, *supra* note 50.

[60] The Basel Convention did not provide for liability and compensation. Instead, parties were merely required to negotiate as soon as possible, a protocol on liability and compensation. See Basel Convention, *supra* note 1, Art. 12. See also online: Basel Convention website < http://www.basel.int/pub/protocol.html> under 'Introduction'.

[61] *Supra* note 12. This provision required States to develop national and international instruments for liability and compensation for victims of pollution and environmental damage.

B. SCOPE AND OBJECTIVES

The Convention only applies to wastes[66] that are "hazardous" and are subject to transboundary movement. A waste is hazardous if: it is listed in Annex I;[67] it exhibits any of the characteristics in Annex III, such as flammability, explosivity, toxicity, and ecotoxicity; or it is defined as hazardous by the national laws of any

---

[62] *Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal,* December 10, 1999, UN Doc.UNEP/CHW.1/WG/1/9/2, the preamble online: Basel Convention website < http://www.basel.int/pub/protocol.html > (hereinafter Basel Protocol).

[63] *Ibid.*

[64] Twenty parties are required to ratify the Protocol in order to bring it into effect. As at December 2006, only seven parties have ratified it. See online: Basel Convention website < http://www.basel.int/ratif/frsetmain.php#protocol >.

[65] A survey conducted at a regional workshop (*Report of the Regional Workshop Aimed at Promoting Ratification of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal* Addis Ababa, Ethiopia, August 30-September 2, 2004 UNEP/CHW.7/INF/11, 2-3) revealed that some of the parties lack the resources to put into effect some of the provisions of the *Basel Protocol* such as the provisions on insurance, financial limits and time limits for instituting action, thus the delay in ratification by parties.

[66] The Convention defined "wastes" as "substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law". See *Basel Convention, supra* note 1, Art. 2(1). This definition raises two points. First, any item or waste intended for disposal or required to be disposed of as a result of industrial operations are wastes. Secondly, any item categorized or listed by the national laws of a State, as waste, is a waste.

[67] Annex I categorized wastes into two types: streams and constituents. "Streams" refer to the production process of the wastes. Examples of waste streams include wastes arising from pharmaceutical operations and surface treatment of metals. "Constituents" refer to the substantive content of the wastes. For instance, wastes may contain metal carbonyls, copper compounds, zinc and so on. See *Basel Convention, supra* note 1, Annex I.

State.[68] Transboundary movement has been defined as "movement of hazardous wastes or other wastes from an area under the national jurisdiction of a State to or through an area under the national jurisdiction of another State provided two States are involved".[69] This means that wastes not subject to transfrontier movement are not covered under the Convention. This definition is significant in that it covers not only obvious cases of transfrontier movement, for example, movement from the generating State to the disposing State, but also situations where the disposer and the generator are in the same State but during the course of the shipment the waste passes through another State.[70] Radioactive wastes[71] and wastes arising from the normal operations of a ship[72] are excluded from the scope of the Convention. These types of wastes are excluded because other treaties or international instruments already cover them.[73]

The key objectives of the *Basel Convention* are to minimize the generation of hazardous wastes in terms of quantity and dangerousness, dispose of hazardous wastes as close to the source of generation as possible, ensure an environmentally sound disposal of wastes, and as far as possible reduce the movement of hazardous wastes and the risks of accidents associated with such transportation.[74]

---

[68] *Basel Convention, supra* note 1, Art. 1(1). This definition has been the subject of criticism by many authors. See for example, David P. Hackett, *supra* note 6 at 291; Hao Nhien Q. Vu, *supra* note 44 at 389; Kathleen Howard, "The Basel Convention: Control of Transboundary Movements of Hazardous Wastes and Their Disposal" (1990) 14 Hastings Int'l & Comp. L. Rev. 223; and Gudofsky, *supra* note 17 for a discussion of the issues.

[69] *Basel Convention, supra* note 1 Art.2(3).

[70] Gudofsky, *supra* note 17 at 236.

[71] *Basel Convention, supra* note 1, Art. 1(3).

[72] *Ibid.* at Art. 1(4).

[73] For instance, radioactive wastes are regulated by the *Convention on Nuclear Safety* June 17, 1994 1963 UNTS 293, effective October 24, 1996 online: IAEA website < http://www.iaea.org/Publications/Documents/Conventions/nukesafety.html >, and the *Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management* 36 ILM (1997) 1436, effective June 18, 2001. The *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters*, Dec. 29, 1972, 1046 U.N.T.S. 120 regulate hazardous wastes arising from ship operations.

1.2 RELEVANT PROVISIONS OF THE BASEL CONVENTION

Generally, State parties are required *inter alia* to reduce the generation of hazardous wastes by adopting clean production methods,[75] ensure that wastes generated are disposed of in an environmentally sound manner,[76] refrain from exporting hazardous wastes to States that have banned the importation of the hazardous wastes[77], obtain the prior consent of the importing and transit States before exporting any waste from its territory,[78] and comply with provisions of the Convention in the transboundary movement of the hazardous wastes and the international rules on packaging and labeling of products for shipment.[79]

For the purposes of this paper, the obligations imposed on the parties can be grouped into two: transportation obligations and disposal obligations. The Convention requires that exportation of hazardous wastes should only take place where the exporting State lacks the technical capacity and expertise to dispose of the wastes in an environmentally sound manner, or the waste is required as a raw material for recycling or recovery in the State of import.[80] This requirement imposes two conditions that must be simultaneously satisfied before exportation can take place. Firstly, the exporting State must demonstrate lack of technical capacity and expertise to dispose of the wastes. Secondly, the importing State must have the technical expertise and appropriate disposal or recycling facilities to manage the hazardous wastes in an environmentally sound manner.[81] Where both conditions are not satisfied, an exporting State is prohibited from exporting the hazardous wastes.[82]

---

[74] See the Preamble to the *Basel Convention.*

[75] *Basel Convention, supra* note 1 Art. 4(2)(a).

[76] *Ibid.* Art 4(8).

[77] *Basel Convention, supra* note 1, Art. 4(1)(b).

[78] *Ibid.* Art 6.

[79] *Ibid.* Art 4(7).

[80] *Basel Convention, supra* note 1 Art. 4(9).

Environmentally sound management of wastes requires that there exist appropriate disposal facilities and precautionary measures for the management of hazardous wastes.[83] It also involves addressing the issue of hazardous wastes through an "integrated life cycle approach" that involves strong controls from the generation of hazardous wastes to storage, transport, treatment, re-use, recycling, recovery and final disposal.[84]

The obligation to ensure that exported wastes are managed in an environmentally sound manner in the country of import has been imposed on the exporting State.[85] There is evidence to show that States have on some occasions violated or ignored this obligation. For instance, the constant movement of hazardous wastes to developing States such as China, India and African States, where the wastes are disposed of in an unsound manner, is evidence of such non-compliance by States. A Greenpeace news report indicates that tonnes of hazardous wastes from computer and other metal scraps were continually dumped in China in 2005 and that the hazardous wastes were recycled manually.[86] The Basel Action Network, a non-governmental organization, reports that about 500 containers filled with used electronic equipment are exported to Lagos, Nigeria every month where they are resold and the remainder dumped in landfills and later burnt, releasing dangerous substances into the environment.[87]

---

[81] The duty to ensure that wastes subject to transboundary movements are managed in an environmentally sound manner is imposed on the exporting State. See *Basel Convention, supra* note 1, Art. 4(8) & (10).

[82] *Basel Convention, supra* note 1, Art. 4(9).

[83] *Basel Convention, supra* note 1, Art. 4(2)(b). Environmentally Sound Management (ESM) of hazardous wastes is defined in Art. 2(8) as "taking all practical steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes".

[84] See "Environmentally Sound Management", UNEP General Information Leaflet, para.1, online: Basel Convention website < http://www.basel.int/pub/environsound.pdf >.

[85] *Basel Convention, supra* note 1, Art. 4(10).

A notable incident occurred in February 2006. A French ship, the *Clemenceau,* containing tons of asbestos and radioactive residue (hazardous wastes) was shipped to India for scrapping. This followed after the bid for scrapping of the ship in the French naval yard was rejected. Upon being confronted with figures from the Basel Action Network on the amount of asbestos on board the ship, the French government denied the figures stating that only 45 tons were left on the ship. It is important to note that the French government had earlier informed the Egyptian government, the transit State, that the ship contained no asbestos. The French government further claimed that Indian ship-breaking authorities received training in France on ship breaking and dismantling.[88] Following protests from non-governmental organizations, private interests groups and environmentalists, and before the arrival of the ship in India, France's Council of State, the highest court on administrative matters, ordered the return of the ship to France. Subsequently, France's president, Chirac, ordered a return of the ship to France because of pressures from its citizenry, the opposition party and finally because of his intended visit to India to discuss economic matters. France's action depicts the trend some years back of dumping ships containing asbestos and other hazardous wastes in India, Pakistan, China and Bangladesh, where labor is cheap and environmental and safety regulations are either non-existent or not strictly enforced.[89]

---

[86] Pictures of these incidents could be seen on the Greenpeace website <http://www.greenpeace.org/international/photosvideos/photos/piles-of-circuit-boards-from-h > and < http://www.greenpeace.org/international/photosvideos/photos/a-chinese-child-sits-amongst-a >. Other instances are discussed in the text of this paper.

[87] See Mark Lewenstein, "Your E-Waste's Journey to Africa", a Basel Action Network (BAN) trade news, November 28, 2006 online: BAN website < http://www.ban.org/ban_news/2006/061128_journey_to_africa.html >.

[88] Full details of the case can be found in Marcos A. Orellana, "Shipbreaking and *Le Clemenceau* Row", (2006) 10:4 ASIL Insight, 1 at 1-4 online: ASIL Website < http://www.asil.org/insights/2006/02/insights060224.html >. The transboundary movement of ships containing hazardous wastes to China and India for scrapping under crude conditions date as far back as 1998.

A more recent incident occurred in August 2006 at Cote d' Ivoire. A Dutch oil trading company, the Trafigura, arranged with a local company, Tommy, to have over 500 tons of hazardous wastes disposed in Cote d' Ivoire. The wastes were disposed of in seventeen strategic places in Abidjan, the country's capital. Trafigura claimed that the waste were routine waste derived from washing its oil tanks and as such, were not hazardous. The wastes were discovered to contain hydrogen sulfide, which in confined spaces causes respiratory problems, blackouts and deaths. Ten people were reported killed and more than 500 hospitalized. Though the Dutch company, the Trafigura, had offered to pay $197million to clean up the site and pay for compensation, it still continues to deny liability for the dumping on grounds that it properly contracted with Tommy, the local company, to have the wastes disposed of and that the company had government papers to do that even though it had no facilities to do the disposal. This is in addition to the fact that the wastes were disposed of at a lesser price ($15,000) than the actual disposal costs (over $500,000) offered by European companies with facilities to do the disposal.[90]

---

[89] See Edie News Centre, "NGOs Accuse Shipping Line of Flaunting International Hazardous Waste Laws" (November 20, 1998), online: Edie newsroom website < http://www.edie.net/news/news_story.asp?id=381 >.

Another incident occurred when a European vessel, the Sea Beirut, towed from France was sent to a Turkish ship-breaking yard for scrapping. The ship contained asbestos. The French authorities, contrary to national and international laws, did not inform the Turkish authorities of the hazardous content of the ship, nor did they classify the ship as hazardous.[91]

Furthermore, exporting States must notify and obtain the written consent of the importing and transit States before embarking on the exportation of the hazardous wastes.[92] There is no time limit within which the importing State must respond to the notification but the transit State must respond within 60 days of the notification, otherwise it would be deemed to have accepted the transit of the wastes through its territory.[93] There was a great controversy during the negotiation of the Basel Convention between the developing nations and the developed nations on this. The developing nations felt that the State of transit should be accorded the same rights as the importing State (that is, the prior written consent of the transit State should be obtained before shipment) while the developed nations were of the view that according the same rights to the transit State will greatly impede the navigational rights of States recognized by international law.[94] The conclusion was a limitation of the timeline within which the transit State must respond to the notification.

---

[90] Toby Sterling, "Dutch Trafigura Settles Waste Case", *The Associated Press,* February 16, 2007 online: Topix website < http://www.topix.net/content/ap/2693127944189141726739737118801294186336 >.

[91] Greenpeace, "Greenpeace Intercepts European Ship Attempting to Illegally Dump Toxic Waste in Turkey", a Greenpeace news report, May 4, 2002, online: Greenpeace website < http://www.greenpeace.org/internatioinal/news/greenpeace-activists-have-inte> .

[92] *Basel Convention, supra* note 1, Art. 6(1)&(3).

[93] *Ibid.* at Art. 6(4).

The notification document must contain the information stated in Annex VA of the *Basel Convention*. Such information includes: the reason for the export, the disposer of the waste and the actual site of disposal, the designation and physical description of the waste, information on any special handling requirement in case of accidents, the quantity in weight and volume, the classification of the waste in accordance with the classification in Annex III,[95] information on the contract between the exporter and the disposer and the process by which the wastes were generated.

The essence of the Annex VA provision is to ensure that full and comprehensive information on the hazardous wastes is presented to the importing State to enable it to make an informed choice. Unfortunately, this objective is defeated by the amount of falsified information sometimes presented by the exporting State. Past incidents suggest that the exporting States or exporters sometimes hide the true nature of the hazardous wastes or disclose partially the nature of the wastes in the notification document to the importing and transit States.[96] A notable case occurred in 1986 (the Khian Sea incident). A Philadelphian Contractor arranged to export 15,000 tons of incinerator ash to the Bahamas. The ash was intended for the construction of a road. The waste was not classified as hazardous under the United States' domestic legislation but tests showed that it contained certain toxic chemicals (dioxins) and heavy metals. Bahamas refused the shipment upon hearing of its true character. The waste was then shipped to Haiti as fertilizer. Three tons were already offloaded before the Haitian government learned of its true character and ordered its removal. The ship sailed without removing the waste. It was later found in Singapore under a new name and a new owner and without the waste.[97]

---

[94] See Katharina Kummer *supra* note 4 at 67 for a full discussion of this.

[95] Annex III identifies hazardous wastes by characterization. Such characterization includes explosivity, toxicity and so on.

[96] The Canadian Office of Enforcement noted in their newsletter, "International Commerce in Hazardous Industrial Waste" online: Environment Canada website < http://www.atl.ec.gc.ca/enforcement/hazardous_waste.html >, 1 at 4 (accessed May 25, 2006): "concealment of shipments of hazardous wasted is attained primarily through paperwork. Shipments are mislabeled as non-hazardous material, destinations are mis-identified, or manifests get lost in the bureaucratic haze associated with multiple border entries and jurisdictional hand-offs".

A more recent example occurred in June 2006. The owners of the *SS Norway* (now SS Blue Lady, ex-France, the third largest ship in the world) decided to dispose of the vessel in India without disclosing the amount of asbestos – about 1,200 tonnes – PCBs and other hazardous wastes on board the ship to the German authorities where the ship had been berthed for two years. To ensure that it got permission to move the ship, the owners falsified the information presented to the German authorities when applying for permission to export the ship. They also informed Germany that the ship is to be exported to Asia for re-use instead of India, which is its final destination.[98] The ship was moved to Malaysia and from there to Bangladesh. Attempts were made to dispose of the ship in Bangladesh but the government of Bangladesh refused the ship entry upon learning of its hazardous content. As at August 2006, the ship lies on a beach in Alang, India following the Supreme Court of India's decision to beach the ship. By the Supreme Court's hearing of March 12, 2007, the ship is to remain in India pending the court's receipt of a report from the Gujarat Maritime Board, Gujarat

---

[97] See Jason Gudofsky, *supra* note 17 at 220.

[98] This is because the Basel Convention, the Basel Ban and the European Union Laws prohibit Germany from disposing its hazardous wastes in developing countries. The European Union has ratified the Basel Ban. See online: Basel Convention website < http://www.basel.int/ratif/frsetmain.php > (under "status of ratification).

Pollution Control Board and Technical Experts Committee ("the Committee") on whether there are some environmental stipulations to be met before the ship is dismantled in India.[99] These examples show a significant level of deliberate non-compliance with the Convention's provisions by at least some of the parties.

Parties are also required to ensure that hazardous wastes intended for transboundary movement are packaged, labeled and transported in accordance with the international laws on packaging and labeling of products for transportation.[100] There are no uniform, standard and binding rules and regulations guiding transportation of hazardous substances including hazardous wastes.[101] The applicable rules depend on the mode of transport. For instance, the *SOLAS Convention*[102] and the *IMDG Code*[103] regulate the transportation of hazardous wastes by sea. National laws and regional agreements regulate the carriage of dangerous goods by road, rail and other means of transportation.[104] The different rules contribute to the lack of uniformity in labeling and packaging standards.

---

[99] NGO Platform on Shipbreaking, "Star Cruises Ltd. And Norwegian Cruise Lines: Deceiving Germany and Violating International Law in the Export of the SS Norway to India", NGO Platform news report of June 30, 2006, online: BAN website < http://www.ban.org/Library/Star_Cruise_Deception_Report_Final.pdf >. See also "Maritime Matters: Ocean Liner History and Cruise Ship News", online: Maritime matters website < http://www.maritimematters.com/norway.html >.

[100] *Basel Convention, supra* note 1 Art. 4(7)(b).

[101] See Katharina Kummer, *supra* note 4 at 26.

[102] *International Convention for the Safety of Life at Sea,* November 1, 1974, 1184 UNTS 278, entered into force May 25, 1980, (has been amended at various times) Annex VII online: Australasian Legal Information Institute (AustLII) < http://www.austlii.edu.au/au/other/dfat/treaties/1983/22.html >. Annex VII, reg. 4 requires that receptacles containing dangerous goods be marked with the correct technical name and identified with a distinctive label or stencil label to make clear the dangerous character.

[103] *International Maritime Dangerous Goods Code*'s provisions have been incorporated into SOLAS and made mandatory except for some recommendatory provisions. See online: IMO website < http://www.imo.org/Safety/mainframe.asp?topic_id=158 >.

[104] Some of the regional agreements according to Kwiatkowska and Soons are the 1957 *European Agreement Concerning the International Carriage of Dangerous Goods by Road; the 1985 International Regulation Concerning the Carriage of Dangerous Good by Rail; the 1970 Regulations on the Carriage of Dangerous Substances on the Rhine.* See Barbara Kwiatkowska & Alfred H.A

As a solution to the problem, in 1956 the United Nations Committee of Experts on the transport of Dangerous Goods, established by the United Nations Economic and Social Council (ECOSOC), published a report recommending the minimum requirements to be applied on the transport of dangerous goods using any mode. The report, which is a model regulation addressed to States and international organizations involved in the transportation of hazardous wastes, and aimed at ensuring uniformity in the development of national and international regulations on transport of dangerous goods including hazardous wastes, is titled *UN Recommendations on the Transport of Dangerous Goods, Model Regulations* (Orange Book).[105] Chapters 4 and 7 of the *Model Regulations* contain extensive provisions on packaging and transportation of dangerous goods.[106] It must be noted that hazardous wastes was not originally covered under the *Model Regulations* and *the SOLAS Convention*. Coverage for hazardous wastes was provided after the entry into force of the *Basel Convention*.[107]

Though these regulations exist to regulate the packaging and labeling of dangerous goods including hazardous wastes, it must be noted that they are merely soft law instruments with no binding effect.[108] Non-compliance with the rules and regulations on packaging and labeling does not attract any penalty and cannot be

---

Soons, *Transboundary Movements and Disposal of Hazardous Wastes in International Law: Basic Instruments* (Dordrecht, Boston: Martinus Nijhoff/Graham and Trotman, 1993) 601-02.

[105] ST/ECA/43-E/CN.2/170 (*Model Regulations)*. This original publication has been amended over the years. The latest amendment, the 14th amendment, was in 2004. For a list and the provisions of the amendments, see online: UNECE website < http://www.unece.org/trans/danger/publi/unrec/rev14/14fword_e.html >.

[106] Chapter 4 requires that dangerous goods be packaged in strong packaging to withstand the shocks of transportation. It also specifies the kind of packaging to be used for packaging dangerous goods. Chapter 7 specifies the kind of transportation requirements to be satisfied before dangerous goods are transported using any mode.

[107] See Katharina Kummer, *supra* note 4 at 28.

[108] *Ibid.* Only the regional agreements mentioned in footnote 104 are binding.

enforced in international courts and tribunals. However, they can be enforced in the courts of those States that have accepted them as binding, as States have the discretion to make such rules binding. Where the rules are accepted as binding in a State, the State can reject the importation or exportation of any hazardous wastes that do not comply with the packaging and labeling regulations.[109] Notwithstanding the non-binding nature of these instruments, they provide a useful basis for future law making as they are built on the expectation that States would abide by them.[110]

Arguably, the parties can solve the problem of lack of uniformity and unenforceability of the rules on packaging and labeling by negotiating a treaty based on the *Model Regulations.* A treaty ensures that the standards are uniform and is also binding on the parties to it.

The *Basel Convention* also stipulates the parties' obligations in the disposal of hazardous wastes. Exporting State parties are required to ensure that wastes exported from their territories are disposed of in an environmentally sound manner.[111] Importing State parties are, likewise, required to ensure that there exists appropriate disposal facilities, which includes recycling facilities, for the disposal of hazardous wastes.[112] As stated earlier, disposal of hazardous wastes covers final disposal (in which case it is not intended for re-use) and recycling.[113]

---

[109] DEQ, "International Packaging Regulations", online: Department of Environmental Quality website < http://www.deq.state.or.us/wmc/packaging/other/int/pkgregulation.pdf >.

[110] See O.Yoshida,, *The International Legal Regime for the Protection of the Stratospheric Ozone Layer:International Law, International Regimes and Sustainable Development,* (The Netherlands: Kluwer Law International, 2001), at 24. See also Darrell A. Posey & Graham Dutfield, *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities,* (Canada: IDRC, 1996), chapter 11 online: IDRC website < http://www.idrc.ca/en/ev-30130-201-1-DO_TOPIC.html >.

[111] *Basel Convention, supra* note 1, Art.4(8).

This part has shown that there are, on occasion, serious and significant incidences of non-compliance by parties with the obligations assumed by them under the *Convention*. Why do States comply or not comply with their treaty obligations? Are there some factors inhibiting them from complying or is their non-compliance merely deliberate? These questions and other issues such as the means of achieving compliance are dealt with in Part II.

PART II COMPLIANCE

Issues of treaty compliance were subjects within the domain of international relations scholars until recently, when international lawyers also began focusing on compliance.[114] That is why studies on compliance are regarded as an interdisciplinary study. Political scientists,[115] economists and lawyers have explored the theoretical foundations of compliance as well as the mechanisms for achieving compliance.[116]

---

[112] *Basel Convention, supra* note 1, Art. 4(2)(b).

[113] See the discussion on part 1.1A above.

[114] Jutta Brunnee, "The Kyoto Protocol: Testing Ground for Compliance Theories" (2003) 63:2 Heidelberg J. Int'l L. 255 at 257, online:< http://www.zaoerv.de> (hereinafter "Jutta Brunnee, "Kyoto Protocol: Testing Ground"") . Kingsbury referred to it as a concept in "current and proposed research using social science methods to study the effects and significance of international law". See Benedict Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1997-98) 19 Mich. J. Int'l L. 345.

[115] E.g George Downs and Anne Marie Slaughter have written on compliance. George Downs is the chief supporter of the Rationalist theory of law. See George Downs, "Enforcement and the Evolution of Cooperation" (1997-98) 19 Mich. J. Int'l L. 319 (hereinafter Enforcement and Evolution). See also, Kal Raustiala & A.M Slaughter, "International Law, International Relations and Compliance" in Beth A. Simmons, Walter Carlsnaes, & Thomas Reese, *Handbook of International Relations* (London: SAGE Inc., 2002) 559.

[116] See Kal Raustiala, "Compliance & Effectiveness in International Regulatory Cooperation" (2000) 32 Case W. Res. J. Int'l L. 387 at 389-400 for a discussion of the interdisciplinary nature of compliance study.

Compliance studies examine States' behaviors *vis-a-vis* the obligations assumed by them, that is, whether the behavior of States conform to the obligations assumed. Raustiala defines "compliance" as "a state of conformity or identity between an actor's behavior and a specified rule".[117] Compliance studies, therefore, seek to determine the reasons why a State complies with its obligations, the factors resulting in such conformity or non-conformity, and the measures that could be taken to enhance compliance.

For a complete understanding of compliance, it is important to distinguish it from related concepts like "implementation" and "effectiveness".[118] Implementation refers to the process of transforming the international commitments of States into domestic legislation. David Victor *et al* defined it more broadly as the "myriad acts of governments, such as promulgating regulations and new laws" and "includes the activities of non-state actors such as firms, scientists … - whose activities are stimulated and redirected by an international agreement".[119] Failure of States to implement treaty commitments in the States could also be considered under compliance. For instance, the non-implementation of the obligations assumed under the *Basel Convention* in the State would result in continual illegal trading in hazardous wastes by corporations in the State. Illegal transactions, therefore, could be said to be the effect of States' non-compliance with or non-implementation of their treaty obligations.

---

[117] *Ibid.* at 391.
[118] *Ibid.* at 392.
[119] David G. Victor, Kal Raustiala & E. Skolnikoff, eds., *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice,* (Austria & Cambridge: International Institute for Applied Systems Analysis & The MIT Press, 1998) 4 (Hereinafter David Victor *et al, Implementation and Effectiveness).*

Effectiveness on the other hand, refers to the degree to which an "accord causes changes in behavior of targets that further the goals of the accord".[120] In assessing the effectiveness of an international law, the totality of actions taken in response to the obligations assumed, and in achieving the goals of the treaty, is considered.[121] This means that implementation and compliance are necessary in determining the effectiveness of an international rule.

The three related concepts, though they affect each other, can operate independently. For instance, there can be compliance with an international agreement without the agreement being implemented or effective.[122] Compliance with the international whaling rules was high but not effective, as there was no change in behaviour of the whaling States, since the rules merely codified existing behaviour.[123] Also, compliance can be considered without the international agreement being implemented especially where the agreement evidences the current practice in the relevant States.[124]

Compliance as a research concept cannot be studied on its own without being related to the various theoretical conceptions about its connotation and significance. According to Kingsbury, "'Compliance' is thus not a free-standing concept, but derives meaning and utility from theories, so that different theories lead to significantly different notions of what is meant by 'compliance'".[125] The different theories on compliance discussed below may explain the reasons for the differences in States' reactions to the international commitments assumed by them.

---

[120] *Ibid.* at 6. Raustiala, *supra* note 116 at 394, defines an effective rule as one that induces desired, observable changes in behavior.
[121] See Meinhard Doelle, *supra* note 9 at 73.
[122] *Ibid.* 71-73. See also Raustiala *supra* note 116 at 392-398.
[123] Kal Raustiala, *supra* note 116 at 392. The International Whaling Commission (IWC) was set up in 1946 to regulate whaling by establishing quotas on whaling to ensure conservation of whale stocks. Before the IWC was set up, whaling States had already agreed on the amount of whales that each State is allowed to catch. The establishment of the IWC thus served no purpose and did not cause a change in behavior of the concerned states.
[124] See Raustiala, *ibid.*

2.1 Theories of Compliance

There are three main theories of compliance: rationalist or utilitarian state-actor theory, norm-driven theory, and liberal or domestic institutional theory. Each of these theories identifies variable factors as the determinant of States' behaviors. The variable factors determining States' compliance posited in the theories are important in designing a compliance strategy for any treaty, including the *Basel Convention*.

A. Rationalist or Utilitarian State-Actor Theory

This theory sees the State as a rational decision-making entity that acts on what it conceives to be in its self-interest, depending on its capacity and the "constraints imposed by the power and interests of others".[126] In deciding on what is in its self-interest in terms of compliance with a treaty, the State considers its "subjective preferences over the relevant alternatives",[127] the benefits of complying and the consequences of non-compliance.[128] In making such decisions, the State adopts the "coordination", "collaboration", and the "non-cooperative" game patterns.[129]

---

[125] Kingsbury, *supra* note 114 at 346.
[126] Kingsbury, *supra* note 114 at 350.
[127] Kingsbury, *supra* note 114 at 349.
[128] Meinhard Doelle, *supra* note 9 at 76. In effect, this theory tries to relate law with economics by positing a State as an individual actor that considers the costs and benefits of acting in one way as against the other way. See Alexander Thomson, "Applying Rational Choice Theory to International Law: The Promise and Pitfalls", (2002) 31 J. of Legal Studies, S285; Robert O. Keohane, "Rational Choice Theory and International Law: Insights and Limitations", (2002) 31 J. of Legal Studies S307 for a discussion of the rational choice theory and its limitation.
[129] Raustiala *supra* note 116 at 400.

The "coordination" game pattern refers to situations where all States benefit from the existence of a given rule[130] while the "collaboration" game pattern refers to situations where all States gain if all States comply with the rule. The collaboration game also covers situations where one State or a couple of States gain more by non-compliance and all States lose if no State complies with the rule.[131] Examples of the "collaboration" game pattern are in international trade issues and the global environmental problems like climate change and ozone depletion.[132] In the collaboration game, a State may decide not to comply because non-compliance benefits it more. Non-cooperative game patterns cover situations where States adopt reciprocal measures in attaining and sustaining compliance.[133] States in the non-cooperative game pattern reward every act of compliance with compliance and every act of defiance with defiance.[134]

There are two distinct groups within the rationalist theory: the institutionalism group (reflecting the legal perspective) and the political economy group (reflecting the social science perspective). The institutionalism group argues that a State as a rational actor complies or refuses to comply with the terms of a treaty on the strength of incentives for compliance or disincentives for non-compliance inserted into a treaty by the international organizations established by the treaty.[135] Emphasis is placed on the enforcement role of institutions and rules made by the institutions in determining the behavior of States. In the words of Kingsbury, "[r]ules and institutions have the further effect over time of shaping actor preferences: that is, preferences are treated as endogenous rather than exogenous".[136]

---

[130] Examples of the coordination game patterns involve agreements negotiated to establish international rules for interstate bank transfers, rules regulating the handling of emergencies at sea and so on. See George Downs, "Enforcement and Evolution", *supra* note 115 at 322.

[131] *Ibid.* See also Meinhard Doelle, *supra* note 9.

[132] *Ibid.* at 401.

[133] *Ibid.* at 401. For a full discussion of the reciprocity game pattern in sustaining co-operation and compliance, see Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy,* (Princeton, New Jersey: Princeton Univ., 1984), 128-31; Robert O. Axelrod, *The Evolution of Cooperation* (New York: Basic Books, 1984).

[134] See generally, Robert Axelrod, *supra* note 133.

The political economy group, (otherwise known as the enforcement school) on the other hand, considers the impacts of external factors on States' behavior. Unlike the institutionalists that believe that enforcement strategies included in agreements and applied by the internal institutions can shape or influence States' compliance, the political economists believe that there are penalties not included in agreements that rest on "tacitly established expectations regarding the consequences of noncompliance" which could be used to enforce compliance by States.[137] They emphasize the importance of enforcement to continued compliance by States. "Enforcement" is defined as the "overall strategy that a State or a multilateral adopts to establish expectations in the minds of state leaders and bureaucrats about the nature of the negative consequences that will follow noncompliance".[138] Any action or a combination of actions that can be used to offset any benefit a potential violator will get from non-compliance qualifies as a punishment strategy.[139] Such actions may be legal, political, economic or non-legal and may take the form of retaliatory action, "withholding of a promised positive incentive", withdrawal of diplomatic missions, and withdrawing from other negotiations with the defecting party on unrelated issues.[140]

---

[135] See Meinhard Doelle, *supra* note 9 at 78 and Raustiala, *supra* note 116 at 404. See also Kingsbury *supra* note 114 at 352 for a discussion of the role of institutions in determining States' behaviour.
[136] Kingsbury, *supra* note 114 at 353.
[137] George Downs, "Enforcement and Evolution", *supra* note 115 at 321.
[138] *Ibid.* at 320.
[139] *Ibid.* at 321.

The proponents of the political economy group also believe that the level of enforcement or punishment that will be engaged to ensure compliance depends on the type of game pattern in operation and the existing incentives to defect.[141] In the coordination game, a punishment strategy may not be necessary as there is no incentive to defect by States.[142] In the collaboration game pattern, however, there is a great incentive to defect by States, hence, the need to adopt a punishment strategy, which is flexible.[143] The amount of punishment adopted should not be so excessive as to hinder future cooperation. Instead, the punishment should be commensurate with the benefits derived from the defection.[144] On the other hand, in the non-cooperative game pattern, the punishment effected by the complying States is equal to the level of non-compliance of the non-complying party. That is to say, that non-cooperation is self-punishing as all States suffer when there is no compliance by any State.[145] For instance, if the States had punished every act of non-compliance with the emissions limits in the *Montreal Protocol* by a State party with their non-compliance, then the ozone layer would have deteriorated at a faster rate and all States would have suffered by such act.

---

[140] *Ibid.* at 321- 324. George Downs *et al,* noted, using the Mediterranean Plan as illustration, that the Mediterranean Plan failed because it "achieved consensus by eliminating any meaningful restrictions on dumping and providing no enforcement mechanisms for those minimal targets and restrictions that were agreed to". See George Downs *et al,* " Good News", *supra* note 10 at 296.

[141] George Downs, "Enforcement and Evolution of Cooperation", *supra* note 115 at 322. See also George Downs *et al*, "Good News", *supra* note 10 at 284-87.

[142] George Downs noted that the agreements that consist of statements of principles or establish institutions or "negotiating forums" are complied with by all States as there is little incentive to defect under those agreements. See George Downs, "Enforcement and Evolution", *supra* note 115 at 323.

[143] The enforcement strategy adopted in any case will vary depending on a number of factors such as "the nature of the good being regulated, the quality of compliance data that is available, and utility uncertainty". Also, the quantum of enforcement strategy depends on the amount of benefit the proposed violator will get from non-compliance. See George Downs, "Enforcement and Evolution", *supra* note 115 at 324 –27.

[144] George Downs, "Enforcement and Evolution of Cooperation", *supra* note 115 at 322-24.

[145] This is because each act of defection by a State is punished by defection by all the States. See the earlier discussion above.

B Norm-Driven Theory

Proponents of the norm-driven theory posit that States are influenced by norms[146] to which they have an "internal volitional commitment" as against considerations of costs and benefits in deciding to comply with an international commitment.[147] There are two schools of thought in the norm-driven theory: the constructivists' school and the managerial school. The constructivist school argues that States comply with rules based on the norms that the rules are legitimate or are to be obeyed because they are laws.[148] They believe that the legitimacy of the rules gives the rules a "compliance pull" that ensures States' compliance.[149] Also, the obligatory nature of rules compels the non-complying State to give reasons to justify its non-compliance. This justification, according to authors on the subject, promotes compliance, as the knowledge that it will have to defend its non-compliant actions induces the State into compliance.[150] Similarities exist between this school of thought and the instrumentalists' school in the realm of realist theory. Both believe in the use of institutions to regulate behavior but they differ in that the constructivists see obedience to rules as part of norms of society whereas the instrumentalists see obedience to rules made by the institutions as a rational choice, which a state decides on based on its self-interests.[151]

---

[146] Chayes and Chayes define "norms" as "*prescription for action in situations of choice,* carrying a sense of obligation, a sense that they ought to be followed". See Abram Chayes & Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press, 1995) 113.

[147] Kingsbury, *supra* note 114 at 355. See also Kal Raustiala, *supra* note 116 at 405 and Meinhard Doelle, *supra* note 9 at 79.

[148] Kal Raustiala, *supra* note 116 at 406.

[149] See Thomas M. Franck, "Legitimacy in the International System" (1988) 82 Amer. J. Int'l L. 705 at 713-759. See also Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford Univ., 1990).

[150] Eyal Benvenisti, "Exit and Voice in the Age of Globalization" (1999) 98 Mich. L. Rev. 167 at 209. He noted that requiring transnational institutions to justify their decisions will promote accountability of decision makers, "just as the reasoning of court opinions serve as a constraint on judicial power".

The managerial school, on the other hand, believes that States, unlike the assumptions of the political economy school, do not voluntarily and intentionally violate their assumed obligations. Rather, three factors are responsible for breach of parties' obligations: "ambiguity and indeterminacy of treaty language, limitations on the capacity of parties to carry out their undertakings, and the temporal dimensions of the social, economic, and political changes contemplated by regulatory treaties".[152] They posit that the use of punitive sanctions to induce compliance is misguided, costly and ineffective.[153] A strategy based on transparency, dispute resolution, persuasion, and capacity building is proposed as a solution to the problem posed by enforcement mechanisms.[154]

The ongoing debate between the managerial school and the political economists represent the key differences between the rational theory and the norm-driven theory.[155] The central point of their disagreement, according to the political economists, is that the empirical evidence used by the managerial school in support of

---

Chayes and Chayes, *supra* note 146 at 26 also noted in support that "judicatory discourse" is a principal method of inducing compliance.

[151] Meinhard Doelle, *supra* note 9 at 70. Meinhard Doelle notes that there is no reason for the mutual exclusivity of both schools as there is difficulty determining when compliance with rules made by institutions is based on norms or rational choice.

[152] Chayes and Chayes, *supra* note 146 at 10.

[153] *Ibid.* at 22 and 33.

[154] *Ibid.* at 22-26.

[155] Raustiala *supra* note 116 at 408.

their contention suffers from selection bias[156] in that it does not show the depth of the cooperation solution chosen.[157] The intention of this paper is not to go into an in-depth discussion of the debate between the two schools but rather to point out their contribution to the understanding of why states comply with their international obligations.

C. Liberal Theory

The liberal theory postulates that liberal or democratic States, that is, States with a representative government, an independent judiciary and respect for human rights, usually comply with international commitments assumed by them, as compared to illiberal or undemocratic States, which do not usually comply with their international commitments.[158] States with democratic structures where decision makers are held accountable for any decision taken or any breach of the constitutional provision are more likely to comply with international law as the international commitments are accorded the same status as domestic laws, and for the breach of which the decision makers are held accountable.[159]

---

[156] This simply means that the number of cases selected does not adequately present the true picture of the cases that the theory seeks to address. See David Collier & James Mahoney, "Insights and Pitfalls: Selection Bias in Qualitative Research", (1996) 49 World Politics 56 at 59.

[157] See George Downs, "Enforcement and Evolution of Co-operation", *supra* note 115 at 328-335, Raustiala *supra* note 116 at 408 and generally Chayes and Chayes, *supra* note 146 for a discussion of the debate.

[158] See Laurence R. Helfer & Anne-Marie Slaughter, "Toward a Theory of Effective Supranational Adjudication, (1997) 107 Yale L. J. 273 at 332. For further discussion of the liberal theory, see A.M Slaughter, "International Law in a World of Liberal States", (1995) 6 EUR. J. Int'l L. 503; Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics", (1997) 51 Int'l Org. 513.

[159] Charles A. Kupchan & Clifford A. Kupchan, "Concerts, Collective Security and the Future of Europe",
(1991) 16 Int'l Security 114 at 115-16, noted that "States willing to submit to the rule of law and civil society at the domestic level are more likely to submit to their analogues at the international level".

The liberal theory is built on three assumptions or hypotheses. Firstly, the "fundamental actors in politics are members of a domestic society, understood as individuals and privately constituted groups seeking to promote their independent interests".[160] The preferences of members of a civil society, determined through the interactions between the different segments of the society, determines the behavior of States.[161] Thus, States act within the constraints imposed on them by their internal society. Secondly, States' policies or actions reflect the interests of some segments of the society. The type of government - military or democracy - determines which segment's interest in the society will be adopted.[162] Thirdly, the behaviours of States reflect the nature of States' preferences.[163] This third assumption determines the stance of States in international bargaining leading to negotiations of international agreements.

The theory that liberal States usually comply with their international agreements does not always hold true. Laurence Heifer and A.M Slaughter have noted that States with the "strongest traditions of domestic rule of law and independent judiciary" may reject international law on the ground that acceptance of international law and its supervisory bodies may weaken the domestic structures.[164] A notable case of this scenario is the constant refusal of international law enforcement by US courts and the preference for domestic laws in cases covered by both domestic and international law.[165]

---

[160] Anne-Marie Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda", (1993) 87 Am. J. Int'l L. 205 at 227 (hereinafter A. M Slaughter Burley, International Law and IR Theory).
[161] Kingsbury, *supra* note 114 at 357.
[162] A.M Slaughter Burley, "International Law and IR Theory", *supra* note 160 at 228.
[163] *Ibid.*
[164] Laurence Helfer & Anne-Marie Slaughter, *supra* note 158 at 332, especially notes 260-61.

2.2 Relevance of Theories to Compliance System Design

While each of the theories discussed above advances our understanding of the reasons why States comply or do not comply with international law, an important question which arises from the discussions is: which of the theories should be adopted in designing an effective treaty compliance system? This question is very significant, as none of the theories constitutes an exhaustive explanation of States' compliance at any point in time.[166] Also, the adoption of a single theory in designing a compliance system may be defeated by arguments on the inherent deficiencies in the application of that theory. For example, as noted by Chayes and Chayes, the "systemic features of international society severely constrain the use of sanctions" which the enforcement model advocates.[167]

In answer to the question, it can be argued that none of the propositions of the three theories examined should be adopted exclusively in designing a treaty compliance system. Empirical studies have shown that there are variable factors that influence a State in deciding to comply with its treaty obligations at any point in time.[168] Jacobson and Weiss identified these variables under four broad categories: " 1) characteristics of the activity involved; 2) characteristics of the accord; 3) the international environment; 4) factors involving the country". These variables show that the number of actors involved in an activity, the nature of the accord in terms of the perceived equity of obligations under the accord and the nature of obligations imposed, the role of the international environment (major international conferences, worldwide media, public opinion, international non-governmental organizations, and international financial institutions), and the existing capacities within a State all influence a State's compliance with its treaty obligations.[169] The empirical work has also shown, in contrast to the enforcement school, that a State may have the intention to comply with a treaty at the negotiating stage but may lack the capacity to do so at the time of implementation.[170] Also, a State may have the capacity to comply with its treaty obligation but may decide not to comply due to competing interests and limited resources to satisfy them. Finally, a State may lack both the capacity and the intention to comply.[171]

---

[165] *Ibid.*

[166] Alexander Thomson notes that a decision may be explained on the basis of rational choice but that does not mean that rational choice alone was the determining factor and not a combination of factors. See Alexander Thomson, *supra* note 128 at 285.

[167] Abram Chayes, Antonia Chayes & Ronald B. Mitchell, " Managing Compliance: A Comparative Perspective", in Harold Jacobson & Edith Brown Weiss, eds. *Engaging Countries*, *supra* note 9, 39 at 41.

From Jacobson and Weiss' empirical study, it may safely be stated that intention to comply is the foundation for compliance.[172] If this is taken as a theoretical given, then all other factors, such as lack of capacity, ambiguity in the law, self-interest, and so on, impinge on the intention to comply in influencing a State's reaction. On this basis, arguably, a combination of two or more of the theoretical approaches discussed above may play a role in actual compliance and may influence the design of an effective compliance strategy.

---

[168] See Harold J. Jacobson and Edith Brown Weiss, eds. "Assessing the Record" in *Engaging Countries, supra* note 9 at 528- 33.
[169] *Ibid.*
[170] In the words of Jacobson and Weiss: "Our studies make it clear that countries were in quite different positions on two dimensions at the time they joined an accord, and that their position on these dimensions changed during the life of the accord. These two dimensions are intention to comply and capacity to comply". *Ibid.* at 537 – 38. This empirical study identified one of the managerial school's precepts – lack of capacity - as being a reason for parties' non-compliance.
[171] *Ibid.*
[172] *Ibid.* at 540.

One potentially effective "combined" approach would be the adoption of both the enforcement approach described by Downs (a segment of the rationalist theory) and the managerial approach advanced by the Chayeses (a segment of the norm-driven theory).[173] The proposal for a combination of the rationalist theory and the norm-driven theory is because both theories, in addition to advancing reasons for States' compliance or non-compliance, contain some mechanisms for achieving compliance: enforcement, capacity building and incentives. Also, support for this "dual approach" abounds in the literature on the subject.[174] Oran Young notes: "It is perfectly possible to argue that soft compliance paths have great potential with regard to regulatory regimes without denying that there is a hard core of noncompliance that will not yield to such treatment".[175]

The enforcement approach will be most useful where the parties had undertaken "hard" or "target-related" commitments and the effectiveness of the treaty depends on the compliance of the parties with hard commitments.[176] The managerial approach will be most useful where the capacity to comply is non-existent or limited; in which case, external assistance and capacity building would be most appropriate in getting parties to comply.[177] A balance, therefore, must be maintained in the adoption and application of both approaches. Jutta Brunnée has observed, in the context of the *Kyoto Protocol*, that the adoption of a "grace period" during which parties are required to correct mistakes or compliance issues before penalties are enforced would provide such a balance.[178]

---

[173] The views of Jacobson and Weiss are apt: " The level of a country's compliance with international environmental accords depends crucially on the leaders and citizens of the country understanding that it is in their self-interest to comply, and then acting on this belief. External assistance and pressure can aid and nudge countries, but there is no substitute for the engagement of self-interest". See Harold Jacobson & Edith Brown Weiss, "Assessing the Record and Designing Strategies to Engage Countries", (hereinafter Jacobson & Weiss, Assessing the Record) in Harold Jacobson and Edith Brown Weiss, eds., *Engaging Countries, supra* note 9, 511 at 541.

[174] See Meinhard Doelle, *supra* note 9; Harold Jacobson & Edith Brown Weiss, *Engaging Countries, supra* note 9.

[175] Oran Young, *supra* note 8 at 97.

The proposed theoretical foundation for a compliance system design does not suggest that its application would ensure one hundred percent (100%) compliance by parties to a treaty. Rather, its aim is to achieve majority compliance by parties.[179]

2.3 Means of Achieving Compliance

Having established a theoretical basis for a compliance system design, the various means of achieving compliance and the actors in compliance are examined.

---

[176] Jutta Brunnée explained these terms by alluding to the "hard" or "target- related" commitments of the Annex 1 parties to the Kyoto Protocol and the "soft" commitments of the non-Annex 1 parties. See Jutta Brunnée, "A Fine Balance: Facilitation and Enforcement in the Design of A Compliance Regime for the Kyoto Protocol", (2000) 13:2 Tulane Envt'l L. J. 223, at 246-47 (hereinafter Jutta Brunnée, "A Fine Balance").

[177] Example of limited capacity to comply occurred with Cameroun's compliance with its obligations under CITES and the World Heritage Agreement. See Piers Blaikie & John Mope Simo, "Cameroun's Environmental Accords: Signed, Sealed, but Undelivered" in Harold Jacobson & Edith Brown Weiss, *Engaging Countries, supra* note 9 at 437. See also Jacobson & Weiss, "Assessing the Record", in Harold Jacobson and Edith Brown Weiss, eds., *Engaging Countries, supra* note 9 at 518.

[178] Jutta Brunnee, "A Fine Balance", *supra* note 176 at 257.

[179] According to Jacobson and Weiss, the determination of the level of compliance with a treaty should be based on the compliance level of major parties. It is more effective, they noted, to get the major party members that contribute to the problem, which the treaty seeks to resolve into compliance than it is to get all of the parties into compliance. See Jacobson & Weiss, "Assessing the Record", in Harold Jacobson and Edith Brown Weiss, eds., *Engaging Countries, supra* note 9, 511 at 522.

The means of achieving compliance are grouped into three headings: sanctions, incentives and procedural means. Each is discussed briefly.

A. SANCTIONS

A sanction or punishment is the traditional remedy for non-compliance.[180] For a sanction to be effective, it must be both "credible and potent".[181] Its credibility lies in the conviction or belief that there exists an efficient system for detecting and punishing non-compliance. Without such a system in place, it will be difficult to enforce sanctions against the non-complying State, and even more so when sanctions operate *ex post facto.* Ronald Mitchell has observed that sanctioning can be made potent by regular meetings of the parties, as this increases opportunities to pressure the non-complying States into compliance.[182] Sanctions are usually required where there is a high incentive to defect by the State bound by the international law (for example, when the benefit of defection is higher than the cost of compliance) and when greater cooperation is needed to prevent defection.[183]

Sanctions may be in the form of fines,[184] trade or economic sanctions, or political sanctions. Trade or economic sanctions involve the imposition of trade restrictions, like a boycott of the non-compliant State's products in other States,[185] bans on the importation of the non-compliant State's products,[186] and withdrawal of financial aid promised to the non-compliant State. Political sanctions involve the withdrawal of diplomatic missions or the expulsion of the State from the treaty.[187]

---

[180] Ronald B. Mitchell, *International Oil Pollution at Sea: Environmental Policy and Treaty Compliance,* (Cambridge: MIT Press, 1994), 48.

[181] *Ibid.*

[182] *Ibid. at* 61.

[183] George Downs, "Enforcement and Evolution", *supra* note 115 at 324. George Downs observed that the "response to defection is nothing more than a punishment that can consist of any response that is sufficiently costly to the other party". See also David Victor, "Enforcing International Law: Implications for An Effective Global Warming Regime", 10 Duke Envt'l L. & Pol'y F. 147 at 164 –165 online: Duke website < http://www.law.duke.edu/journals/delpf/articles/delpf10p147.htm >.

[184] This involves the imposition of high penalties for non-compliance. This serves to deter potential non-complying States. The major problem with this measure is that if the fine imposed for non-compliance is excessive, it may affect the ratification of the treaty.

These sanctions are usually imposed on the non-compliant State even though its application may have negative effects on the entire population in the State.[188] The imposition of sanctions on a State was based on the theory that " "economic pain" in the targeted countries will somehow result in "political gain"".[189] Over time, it became obvious that the goal of "political gain" was rarely achieved, as the sanctions most often did not induce a change in the behaviour of the government and corporations involved.[190] A notable example is the Iraq regime. The trade sanctions imposed on Iraq (aimed at inducing the Saddam Hussein government into destroying all weapons of mass destruction in Iraq) led to the deterioration of the Iraq economy which caused untold hardship and suffering on the Iraq populace without causing any change in the attitude of the Iraq government.[191]

---

[185] This was used in 1988 to force Iceland to stop its scientific research project that involved the killing of whales being regulated by the International Whaling Commission. This resulted in an estimated loss of US$30m for Iceland and a subsequent abandonment of the project. See Steinar Andresen, "The Making and Implementation of Whaling Policies: Does Participation Make A Difference?" in David Victor *et al, Implementation and Effectiveness, supra* note 119, 431 at 456-459.

[186] This is currently used in the Montreal Protocol. See *Montreal Protocol, supra* note 11, Art. 4.

[187] States rarely expel State parties from the treaty on grounds of non-compliance. This is because the number of parties to a treaty contributes to its effectiveness and bindingness.

[188] In the words of Michael Brzoska, "sanctions hurt the population without having much influence on decisionmakers". See Michael Brzoska, "From Dumb to Smart? Recent Reforms of UN Sanctions", (2003) 9 Global Governance 519 at 520.

[189] *Ibid.*

[190] *Ibid.* See also Daniel W. Drezner, "How Smart are Smart Sanctions", (2003) 5 Int'l Stud. Rev. 107 at 107.

[191] Barbara Plett, "Analysis: Will 'smart' sanctions work?", a BBC News Report, June 2, 2001, 1 online: BBC News Online website < http://news.bbc.co.uk/1/hi/world/middle_east/1366201.stm >. For more on Iraq sanctions and its effects, see Peter Walensteen, Carina Staibano, & Mikael Eriksson, "The

The injustice of applying sanctions on the entire State led to the development of "smart sanctions".[192] Smart sanctions or targeted sanctions refer to those sanctions aimed at penalizing the violators of the treaty (e.g., the corporations and the government agency involved) while sparing the general population.[193] Examples include arms embargoes, travel bans, targeted financial sanctions (asset freezes, withholding of credits, restrictions of transactions)[194], and diplomatic sanctions.[195] The type of smart sanctions adopted depends on the objective of the sanction and the political economy of the target State.[196] The smart sanction adopted must be one that sufficiently hurts the target as to induce compliance. If not, it will be deemed ineffective.

The advantages of smart sanctions over other types of sanctions are that it ensures that the violators of the treaty provisions are punished and it is flexible. It can be reviewed at short notice if it is discovered that the desired objective is not being achieved.[197] More than one of the smart sanctions can be used to achieve the desired objective. The disadvantages are that it suffers from implementation difficulties and its

---

2004 Roundtable on UN Sanctions Against Iraq: Lessons Learned", (Uppsala, Sweden: Uppsala University Department of Peace and Conflict Research, 2005) online: Special Program on the Implementation of Targeted Sanctions (SPITS) website < http://www.smartsanctions.se/literature/iraqreport_050210.pdf >.

[192] See Michael Brzoska, *supra* note 188 at 520 -21.

[193] Daniel Drezner referred to it as sanctions "designed to raise the target regime's costs of non-compliance while avoiding the general suffering that comprehensive sanctions often create". See Daniel Drezner, *supra* note 190 at 107.

[194] Michael Brzoska, *supra* note 188 at 525.

[195] UN Sanctions Secretariat, "The Experience of the United Nations in Administering Arms Embargoes and Travel Sanctions", an informal background paper prepared by the Department of Political Affairs, United Nations Secretariat, online: UN website < http://un.org/sc/committes/sanctions/background.doc >, 3.

[196] Drezner, *supra* note 190 at 107. See also Michael Brozska, ed., *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions – Results of the 'Bonn – Berlin Process'* (Bonn: Bonn International Centre for Conversion (BICC), 2001), chapter 7: 2 online: BICC website < http://www.bicc.de/events/unsanc/2000/pdf/booklet/chapter_7.pdf >. (hereinafter Michael Brzoska, *Design and Implementation of Arms Embargoes*).

[197] Michael Brozska, *supra* note 188 at 522.

objectives are greatly undermined by sanction breakers.[198] Implementation of some of the smart sanctions e.g financial sanctions require administrative and legal capacities which some states do not have. The UN experience in the implementation of arms embargoes especially on União Nacional para Independência Total de Angola (UNITA) show a lack of commitment by States. Burkina Faso and Cotê d'Ivoire were among the States that disobeyed the arms embargoes on UNITA.[199]

Though smart sanctions have been applauded as a great reform in the field of sanctions, some international scholars are skeptical as to its efficacy.[200] The fundamental argument against the smart sanctions is based on an inherent weakness to induce compliance. Brzoska opines: "…smart sanctions of the type discussed above can and must be questioned on a more fundamental level. Can they really hurt the targets to such a degree that decisionmakers will change their incriminated behaviour?"[201] For instance, travel bans may be irritating but it may be insufficient to induce a change in behaviour.

Despite the criticisms leveled against smart sanctions, it is a welcome development in international politics. Its use as a treaty compliance mechanism is possible. Adoption of appropriate monitoring and enforcement strategies would enhance its efficacy.

---

[198] *Ibid.* at 522-27.

[199] *Ibid.* at 526.

[200] See David Cortright, George A. Lopez, & Linda Gerber, *Sanctions and the Search for Security* (Boulder: Lynne Rienner, 2002) 1. See also Michael Brozska, *supra* note 188 at 529 –30 and Daniel Drezner, *supra* note 190 at 107 –10.

[201] Michael Brzoska, *supra* note 188 at 531.

B. INCENTIVES

Incentives have been used as a regulatory tool in all spheres of life both domestically and internationally to induce the required conduct from States, individuals and corporations. In environmental protection, incentives are advocated as a means of getting disadvantaged, non-compliant States to comply with any international agreement.[202] They include any kind of help or assistance given to a State by other States, IGOs, non-governmental organizations, or other institutions to ensure that State's compliance with a treaty. Rosalind Reeve described it summarily as "payoffs to other countries to cooperate".[203]

Incentives may be financial or non-financial. Financial incentives involve the payment of monetary compensation to a non-compliant State to help off-set the cost of its compliance with a treaty. The payments, often called "side transfers/payments", are usually made to the developing nation treaty parties on grounds that such nations cannot bear the costs of compliance alone, hence the increased incentives to violate the treaty.[204] For instance, the *Montreal Protocol* provides for financial incentives from the developed nations to the developing nations to refrain from the use of chlorofluorocarbons (CFCs) and to develop alternatives to CFCs.[205] To ensure that such funding is available to the developing nations, the Montreal Protocol's fund was established.[206] Apart from direct payment, financial incentives can be in form of direct tax holiday and subsidies, grants and awards[207] (grants and awards are usually given to promote research and development of environmentally friendly technology), debt forgiveness, and debt-for-nature swaps.[208]

---

[202] Chayes and Chayes, *supra* note 146 at 25-28, noted that States that may violate their international commitments due to technology backwardness or any other disadvantage should be assisted by other States in complying.

[203] Rosalind Reeve, *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (London: Royal Institute of International Affairs & Earthscan Publications Ltd., 2002), 21.

[204] Editors of the Harvard Law Review, *Trends in International Environmental Law* (USA: American Bar Association, 1992) 97 (hereinafter *Trends in International Environmental Law*).

[205] *Montreal Protocol, supra* note 11, art. 10(1).

Though the use of financial incentives is highly beneficial in inducing compliance, their applications raise problems. First, it is difficult to get developed States to pay money to developing States to comply. This is because States compete with each other in the use of their resources and each State is more concerned with the satisfaction of its citizenry than with the consideration of another State's interests.[209] Second, the non-existence of an international monitoring system may make it difficult for international law to monitor the application of the payments and ensure that it is used for the intended purpose.[210] These problems are not insurmountable. In the first instance, establishment of a reciprocal incentive structure for the developed nations can ensure their cooperation.[211] A developed State's action in this regard may be praised or given international recognition, which will make other States consider following the trend of those countries. Also, an international group of experts can be established to monitor the application of any financial aid given and to liaise with the

---

[206] *Ibid.* Art. 10(2).

[207] See P.N Garbosky, "Regulation by Reward: On the Use of Incentives as Regulatory Instruments" (1995) 17 Law & Policy 257 at 259- 261.

[208] See *Trends in International Environmental Law, supra* note 204 at 100-102 for a discussion of the debt for nature swaps.

[209] *Ibid.* at 100.

[210] See generally Garbosky, *supra* note 207. See also James Andrew Bove, "A Study of the Financial Mechanism of the Montreal Protocol on Substances that Deplete the Ozone Layer", (2002/3) 9 Envt'l L. 399 at 441.

[211] Garbosky, *supra* note 207 at 259 – 263.

State concerned on the measures to take to ensure effective application of the money.[212]

Non-financial incentives involve other forms of inducements used in pressuring States into compliance. They are praise and recognition, awards, access to markets (an example of this is the CITES permit system), access to technology or technology transfer and other forms of capacity building such as the application of common but different responsibility in environmental protection.[213] Technology transfer is a compliance incentive used in assisting developing States to meet their treaty obligations. It involves a transfer of the "best available environmentally safe technology" at fair and favourable conditions to developing States.[214] Transfer of technology as a compliance incentive aims not only at ensuring parties' compliance but also makes accessible the best technology to States that would not have had such access.[215]

Incentives as a compliance inducement tool is advantageous in that other non-complying States may decide to comply in order to benefit from the incentives; incentives are seen as more legitimate than sanctions because sanctions alienate the non-complying State from other States whereas incentives do not; and incentives promote "organizational enhancement".[216] Despite their advantages, the disadvantages of incentives are that they enhance the freedom of choice of the defaulting State: the defaulting State may accept or refuse the incentive offered. Where the incentive is refused, the non-compliance continues and the effectiveness of the treaty is reduced. Incentives may produce negative consequences like over-dependence on the incentives (leading to a return to non-compliance upon the discontinuance of the incentive); and the use of incentives is expensive especially where the incentive is financial.[217] A philosopher, Norregaard, noted some three centuries ago that the cost of rewarding one thousand obedient subjects is greater than the cost of punishing one transgressor.[218]

---

[212] Gilbert Bankobeza posits that the use of financial incentives is "more effective if coupled with monitoring to ensure that the obligations are complied with than resorting to classical means of treaty enforcement, which includes punitive measures". See Gilbert Bankobeza, "Strengthening the Implementation of Multilateral Environmental Agreements", a paper presented at the Seventh International Conference on Environment and Compliance 9-15 April, 2005, 253 at 255 online: INECE website < http://www.inece.org/conference/7/vol1/Bankobeza.pdf#search=%22Incentives%20in%20Montreal%20Protocol%22 >.

[213] See P.N Garbosky, *supra* note 207 at 259 and Rosalind Reeve, *supra* note 203. See also Gilbert Bankobeza, *ibid.* at 254.

[214] See *Montreal Protocol, supra* note 11, Art. 10(A).

[215] Gilbert Bankobeza, *supra* note 212 at 256.

C. PROCEDURAL MEANS

The procedural means of ensuring compliance are information reporting, monitoring, verification and dispute resolution.[219] These procedural means are the backbone of treaty compliance. That is why every environmental treaty has provisions on these subjects.

---

[216] See P.N Garbosky, *supra* note 207 at 262-265 for a discussion of the advantages. Garbosky noted under "organizational enhancement" that incentives from external sources affect "inter-group dynamics" within the organization and it enhances "internal compliance programs designed to detect and prevent corporate misconduct". See p. 265.

[217] See P.N. Garbosky, *supra* note 207 at 265-272 for a discussion of the disadvantages of the use of incentives as a compliance tool.

[218] Vilhelm Aubert, "On Methods of Legal Influence" in S. Burman & B. Harrel-Bond, *The Imposition of Law* (New York: Academic Press, 1979), 30. Schwartz and Orleans further observed in support: " Extension of rewards to all who observe the law would be expensive, difficult to administer, and ineffective if the recipients were numerous". See R. Schwartz & S. Orleans, "On Legal Sanctions" in Michael Barkun (ed.), *Law and the Social System* (New York: Lieber-Atherton, 1973) 63, at 96-97.

[219] See Jutta Brunée, "The Kyoto Protocol: Testing Ground", *supra* note 114 at 262.

Information reporting involves a submission of data by a State on its compliance efforts.[220] The frequency of the reports and the details of the reports are usually specified by the treaty in question. For instance, the *Basel Convention* requires the parties to submit annually a report, *inter alia,* of transboundary movement of hazardous wastes carried out by the State and any accident occurring during the movement; of development of technologies for the reduction or elimination of the production of hazardous wastes; and on measures adopted in implementing the provisions of the Convention.[221] Similarly, CITES require the parties to keep a record of all transactions involving protected species and to inform the Secretariat annually of such transactions, including permits issued, and to report biennially on administrative and legislative measures taken to enforce the provisions of the Convention.[222] By requiring the parties to submit this information and by publishing the information received on the treaty websites for public consumption, States are put on the alert, as none wants to be seen as a violator of its international commitments.[223] Also, data collected from the reports can form the basis of parties' discussions at the meeting of the parties and committees, and can influence other States in adopting the technology or production methods used by a State to improve their production processes in line with treaty requirements.[224]

---

[220] Gerhard Loibl, "Reporting and Information Systems in International Environmental Agreements as a Means for Dispute Prevention – The Role of "International Institutions"", in *Non-State Actors and International Law* Vol. 5 (The Netherlands: Koninklijke Brill NV, 2005)1 at 13. See generally, P. Sands, *Principles of International Environmental Law 2nd ed,* (United Kingdom: Cambridge University Press, 2003); Xinyuan Dai, "Information Systems in Treaty Regimes" (2002) 54 World Politics, 405 at 409-20.

[221] *Basel Convention, supra* note 1, Art. 13.

[222] CITES, *supra* note 12, Art.VIII (7).

[223] Gerhard Loibl has classified this procedure as the utilization of "shame". See Gerhard Loibl, *supra* note 220 at 17.

Information reporting by States does not only serve as a means of ensuring compliance with a treaty; it also serves as a sieve for determining if the objectives of the treaty are being met and if there is any need to develop new policies to ensure that the objectives of the treaty are met.[225] While information reporting plays a great role in compliance, it must be recognized that information reporting places a great burden on States who have other competing interests and limited resources to allocate to reporting. To reduce this burden, a "harmonization and streamlining of the reporting requirement" in various international treaties has been suggested.[226] This has led to the development of guidelines on reporting in treaties like the *Kyoto Protocol* and the development of Internet clearing houses, where all information collected is kept in a database accessible to all parties.[227]

The major problem with information reporting by parties is the accuracy of data submitted.[228] To counter this problem, some environmental treaties have established a procedure for verifying the accuracy of the data submitted.[229] Without such a verification procedure, reliance on the data submitted by the parties may give a false picture of parties' compliance with the treaty. Unfortunately, most environmental law treaties like the *Basel Convention* do not have such an internal verification procedure. Rather, verification of information in the *Basel Convention* is left to the parties - who more often than not will not report any infraction of the treaty by other parties to avoid similar treatment by the parties when in breach.[230]

---

[224] *Ibid.* at 15-16.

[225] See Scott A. Hajost & Quinlan J. Shea III, "An Overview of Enforcement and Compliance Mechanisms in International Environmental Agreements", a paper delivered at the International Network for Environmental Compliance and Enforcement, 1st International Enforcement Workshop, Utrecht, The Netherlands, May 1990 online: INECE website < http://www.inece.org/1stvol1/hajost.htm >, para. 3.2.

[226] Gerhard Loibl, *supra* note 220 at 18.

[227] *Guidelines for the Implementation of Article 6 of the Kyoto Protocol,* Decision 16/CP.7, in Report of the Conference of the Parties on its Seventh Session held at Marrakesh from October 29 to Nov. 10, 2001, FCCC/CP/2001/13/Add.2 (January 21, 2002), 5. See also Gerhard Loibl, *supra* note 220 at 14.

[228] See Duncan Brack, "Monitoring the Montreal Protocol", in Trevor Findlay, ed., *Verification Yearbook 2003* (London: VERTIC, 2003) 209 at 215 online: VERTIC website < http://www.vertic.org/assets/YB03/VY03_Brack.pdf >..

[229] For instance, the Kyoto Protocol, in article 8, established an independent expert review teams to verify the accuracy of data submitted by parties.

The States themselves, citizens, non-governmental organizations and governmental organizations monitor parties' compliance.[231] The roles of these bodies in this regard will be discussed in the subsequent section. Monitoring involves developing a system for detecting and correcting violations and evaluating parties' compliance efforts with treaty obligations.[232] Monitoring can be done in various ways namely, inspections (this may be conducted on a routine basis or "for a cause" - where it is believed that a State is not in compliance) by inspectors appointed by the institution involved, self- reporting by parties, investigations following citizen complaints, and independent organizations' assessment of States' compliance status.[233]

Dispute resolution mechanisms also play a role in parties' compliance as they provide avenues for settlement of disputes between the parties. The existence of dispute resolution mechanisms increases parties' confidence in the treaty and ensures the maintenance of international peace and security.[234] The knowledge that disputes resulting from the breach of the treaty's provision can be resolved helps to keep non-conforming parties in check. States can adopt any number of dispute resolution mechanisms in resolving their disputes. The dispute resolution mechanisms that may be adopted include: litigation in the national or international courts, mediation, negotiation, and arbitration.[235] The type of dispute resolution mechanism to be adopted in any instance is usually specified by the treaty involved. For instance, the *Basel Convention* specifically requires the parties to negotiate any dispute arising or to adopt any other peaceful means of their choice in resolving their disputes. Where they are unable to resolve the dispute by negotiation or other peaceful means, they can refer the dispute to adjudication by the International Court of Justice (ICT) or to arbitration by an arbitral tribunal, agreed upon by the parties.[236]

---

[230] John Knox, "Citizen Suits in International Environmental Law: The North American Experience", 1 online: INECE website <http://www.inece.org/conf/proceedings2/42-KNOX%20NewALT.pdf >. This is an excerpt from his paper titled " A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission" (2001) 28:1 Ecology L.Q. 1.

[231] Xinyuan Dai, *supra* note 220 at 409- 11.

[232] INECE, "Monitoring Compliance", an INECE publication online: INECE website < http://www.inece.org/princips/ch6.pdf >.

[233] *Ibid.*

2.4 Players in the field of Compliance

The players or actors in compliance can be broadly classified into two groups: State actors and non-state actors. The principal players in the international system are States. This is because international law is concerned with regulation of States' behavior and the regulation of the relationship between States *inter se*. It was not until the 20th century that non-state actors became prominent in the international scene.[237]

---

[234] See *Charter of the United Nations*, June 26, 1945, 59 Stat. [illegible], TS 993 effective October 24, 1945 online: United Nations website < http://www.un.org/aboutun/charter/ >, Art. 2(3), which provides: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".

[235] Scott A. Hajost & Quinlan J. Shea III, *supra* note 225 at 9-10.

[236] *Basel Convention, supra* note 1, Art. 20.

[237] See Alexandre Kiss & Dinah Shelton, *International Environmental Law*, 3rd ed., (New York: Transnational Inc., 2004), 162.

The action of other States can influence a State in deciding whether to comply with an international commitment. When all signatory States comply with the terms of a treaty, there is every tendency for every other State joining the treaty to act likewise.[238] Also, the legislative, administrative and developmental actions taken by a State in complying with a treaty can influence other States, especially where such actions promote the objectives of the treaty.[239]

A sub-group of actors in the international scene are the governmental institutions. Governmental institutions are further grouped into intra-governmental institutions and inter-governmental institutions. The intra-governmental institutions refer to the internal governing bodies of a treaty. They are the Conference of Parties (COP), the Secretariat and any Committee established under the treaty. Each of these bodies plays an important role in compliance monitoring and acts in a quasi-legislative capacity. For instance, the COP, sometimes recognized by some treaties as the supreme body of the treaty,[240] is usually empowered to review the implementation of treaties, to facilitate exchange of information between the parties, and the publication of parties' reports. The COP in effect ensures the flexibility and responsiveness of treaties.[241]

---

[238] Jacobson and Weiss commented on the influence of a State's compliance efforts on other countries in these words: " … having what may be termed a "leader" is crucial to the negotiation of environmental accords and to the promotion of compliance with them. In fact, in the cases studied here, it is hard to see how effective progress would have been made without the efforts of leader countries". Jacobson & Weiss, "Assessing the Record" in Jacobson & Weiss, eds., *Engaging Countries, supra* note 9 at 537.

[239] Gerhard Loibl has noted that the compliance reports filed by States form a basis for comparing States' activities and can influence other States in adopting a similar technology used by a State in promoting the objectives of the treaty. See Gerhard Loibl, *supra* note 220 at 15-16.

[240] See for instance, *United Nations Framework Convention on Climate Change,* May 9, 1992, 1771 UNTS 107, Effective March 21, 1994 online: UNFCCC website < http://unfccc.int/essential_background/convention/items/2627.php >, Art. 7(2) (hereinafter "UNFCCC").

The Secretariat, on the other hand, functions as a clearing house for submission of information, forwarding of information to the parties and exchange of information. The Secretariats also help in capacity building and technological advancement of parties by some programmes established by them.[242] They are, however, limited in their functions by the powers designated to them under the treaty. For instance, the *Basel Convention's* Secretariat can only receive and publish reports of compliance forwarded to it by the parties; it has no power whatsoever to verify the accuracy of the reports submitted.[243]

Inter-governmental organizations (IGOs) refer to the external organizations that play a role in environmental governance and monitoring. They include global organizations like the various agencies and commissions of the United Nations such as the Food and Agricultural Organization (FAO), World Health Organization (WHO), and the United Nations Environmental Programme (UNEP); regional organizations like the African Union;[244] sub-regional organizations; and bilateral organizations like the Niger River Commission established in 1964 to promote and co-ordinate all matters relating to the exploitation of the basin resources.[245]

---

[241] See Alexandre Kiss & Dinah Shelton, *supra* note 237 at 150-151.
[242] *Ibid.*
[243] See generally, *Basel Convention*, *supra* note 1, Art. 16.
[244] The African Union is responsible for the promulgation of the *Bamako Convention*, *supra* note 2, which bans the exportation of hazardous wastes into Africa from non-African nations.
[245] See Alexandre Kiss & Dinah Shelton, *supra* note 237 at 146 for a discussion of this.

Non-state actors are the non-governmental organizations (NGOs) such as the World Wildlife Fund for Nature (WWF),[246] Greenpeace International,[247] and Friends of the Earth.[248] Such NGOs play an important role in States' compliance with treaties.[249] Their roles are most obvious in their monitoring activities.[250] They check reports of compliance submitted by parties and raise inconsistencies in them. They also conduct independent research and generate compliance reports independent of the parties' submitted reports.[251] For instance, NGOs like Greenpeace provide the Basel Secretariat with information on illegal dumping of hazardous wastes by parties.[252]

Apart from monitoring and reporting on parties' compliance with treaties, NGOs also mobilize public opinion against defaulting States or potential defaulters to get them into compliance or to desist from the proposed course of non-compliance.[253] For instance, Greenpeace organized a boycott of Shell's gasoline in order to force Shell to recover its Brent Star oil rig that it (Shell) intended to abandon on the ocean floor.[254] They can bring an action against non-complying States, especially in situations where a treaty empowers them to institute actions, or participate indirectly in disputes between parties by submitting briefs as *amicus curiae*. An example occurred in the U.S Shrimp/Turtle Case before the World Trade Organization (WTO),[255] where a representation made by a group of NGOs, as *amicus curiae,* was accepted by the WTO despite protests by some parties.

---

[246] See their website < http://www.wwf.org> or < http://www.panda.org >.

[247] See their website < http://www.greenpeace.org/international >.

[248] See their website < http://www.foei.org >.

[249] This does not mean that the NGOs do not participate in other aspects of international law. They influence treaty development and in some instances may draft treaties for discussion and adoption by parties. See Alexandre Kiss and Dinah Shelton, *supra* note 237 at 167 and Philippe Sands, "The Role of Non-Governmental Organizations in Enforcing International Environmental Law" (Philippe Sands, "Role of NGOs") in William Butler, ed. *Control Over Compliance With International Law* (Dordrecht: Martinus Nijhoff, 1991) 61 at 63-64 for more information on the role of NGOs in treaty development.

[250] Chayes and Chayes, *supra* note 146 at 164, comments that "all environmental treaty secretariat testify to the importance of the information and auditing activities of NGOs".

[251] Alexandre Kiss & Dinah Shelton, *supra* note 237 at 304.

[252] See Chayes and Chayes, *supra* note 146 at 165. See also Xinyuan Dai, *supra* note 220 at 433.

[253] Alexandre Kiss and Dinah Shelton, *supra* note 237 at 163 -67.

[254] See Tony Paterson, "North-Sea Shell Game: Greenpeace's Campaign Against Oil Multinational Royal Dutch Shell", *The European* June 30-July 6, 1995.

The roles of NGOs in compliance are made possible due to their access to funds, the neutrality of their status, and access to the public and media houses. The NGOs are funded by their members and by the public. The availability of funding ensures the optimum performance of their duties especially in areas where the treaty secretariats cannot do much due to unavailability or inadequacy of funding. NGOs are non-state actors and as such are not bound by the sovereignty norm as States are. States seek to protect their interests and sovereignty in international negotiations.[256] This does not mean that the NGOs are entirely devoid of partisanship in their monitoring of parties' compliance. They are sometimes caught up in the web of international politics and are often selective in their approach to issues (such as "targeting 'weak' states or tackling only politically acceptable issues")[257] The result is an exaggeration of non-compliant acts by States if such exaggeration would serve to put them in the limelight or assist them in attaining their own goals.[258] David Victor notes in this regard:

> …[e]nforcement actions have been plentiful when whaling ships and clandestine toxic trade by multinational

---

[255] *United States-Import Prohibition of Certain Shrimp and Shrimp Products,* WTO Appellate Body Report Feb. 27,1997, AB Report, WT/DS58/AB/R.

[256] A. Dan Tarlock, "The Role of Non-Governmental Organizations in the Development of International Environmental Law" in Paula M. Pevato ed., *International Environmental Law Volume 1* (England/USA: Dartmouth & Ashgate, 2003) 369 at 380.

[257] Cesare Pitea, "NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition", in Tullio Treves *et al,* eds. *Civil Society, International Courts and Compliance Bodies,* (The Netherlands: T.MC. Asser, 2005) 205 at 221.

[258] See David Victor, "Enforcing International Law", *supra* note 183 at 170-71 and Xinyuan Dai, *supra* note 220 at 433-34.

> corporations are the targets, but not so abundant when they concern less tangible, often chronic implementation failures. Boycotts against whaling nations organized by public interest groups, … have been abundant even when there has been no formal situation of non-compliance.[259]

The fact that they are non-state actors affects their access to information. States, corporations, agencies and businesses are more comfortable giving information to the NGOs than they are giving it to other formal bodies.[260] Without the media access given to NGOs, publication of information generated would not be possible or would be quite difficult; and treaty compliance would not be achieved.[261]

The increasing powers of NGOs in international treaty development and compliance have led to concerns about their legal status and lack of standards of accountability.[262] The concerns center on the need to streamline the relationship between the NGOs and the IGOs in order to ensure that there are no "duplication, loss of information and waste of resources".[263] The increase in the number of NGOs, the claims for more participatory rights by the NGOs, and the corruption of accreditation processes have also added to the concerns.[264] The number of NGOs applying for a consultative status with the UN ECOSOC increased from 20-30 per year (in the 70s and 80s) to 400 in 2001.[265] This increase in number has led to more agitation for more participatory rights and recognition. Also, States sometimes use the NGO accreditation procedures to promote NGOs that would protect their interests. The result is a lack of confidence in the information presented by NGOs including the well-known and genuine ones like Greenpeace.[266]

---

[259] David Victor, "Enforcing International Law" *supra* note 183 at 170-71.

[260] Steinar Andresen & Lars H. Gulbrandsen, "The Role of Green NGOs in Promoting Climate Compliance", in Olav Schram Stokke, Jon Hovi & Geir Ulfstein, eds. *Implementing the Climate Regime: International Compliance* (London: Earthscan, 2005) 169 at 170-72 (hereinafter Olav Stokke *et al, Implementing the Climate Regime*).

[261] *Ibid.*

[262] A. Dan Tarlock, *supra* note 256 at 378 & 383.

[263] NGOs enjoy a "consultative" relationship with IGOs. This relationship was initially introduced in the United Nations to give effect to article 71 of the UN Charter. The rights conferred by the 'consultative status" include: the right to receive meeting agendas, attend meetings, submit written and oral presentations to UN ECOSOC. See Emanuele Rebasti & Luisa Vierucci, "A Legal Status for NGOs in Contemporary International Law?", online: ESIL website < http://www.esil-sedi.eu/english/pdf/VierucciRebasti.PDF >, 2-3; Jan Wouters & Ingrid Rossi, "Human Rights NGOs: Role, Structure and Legal Status", (2001) 14 University of Leuven Institute of International Law Working Paper, online: University of Leuven website < http://www.law.kuleuven.be/iir/nl/wp/WP/WP14e.pdf >, 8.

To deal with these concerns, some NGOs, IGOs and international lawyers have suggested formal recognition in terms of a legal status for NGOs.[267] Formal legal status would ensure legal certainty and uniformity in the interaction between NGOs and IGOs.[268] In the words of Dan Tarlock:

> At the present time, their activity needs only to be encouraged and monitored. However, as they acquire more real power, they must be brought into established legal systems so that they can be subjected to standards of accountability. NGOs should not be held to the standards of national states or international organizations, but minimum norms of responsible environmental participation should be developed to monitor their performance.[269]

---

[264] See Kerstin Martens, "Examining the (Non) Status of NGOs in International Law", (2003) 10 Ind. J. Global Legal Stud. 1 at 8.

[265] Emanuele Rebasti & Luisa Vierucci, *supra* note 263 at 4; Laurie Wiseberg have noted that about 840 NGOs participated during the Vienna Conference on Human Rights in 1993. See Laurie S. Wiseberg, "The Vienna World Conference on Human Rights" in Eric Fawcett & Hanna Newcombe, eds., *United Nations Reform: Looking Ahead After Fifty Years* (Toronto: Science for Peace, 1995), 175.

[266] Kerstin Martens, *supra* note 264 at 8-9.

[267] See generally Emanuele Rebasti & Luisa Vierucci, *supra* note 263; Jan Wouters & Ingrid Rossi, *supra* note 263, para. VI.

[268] Emanuele Rebasti & Luisa Vierucci, *supra* note 263 at 5.

[269] A. Dan Tarlock, *supra* note 256 at 383.

While some NGOs and IGOs are in favour of formal recognition, some authors have expressed doubts on the viability of this suggestion.[270] They feel that granting legal status to NGOs would lead to a loss of flexibility, which is needed for optimal performance of their duties.[271] Also, the effectiveness of a regime of legal personality has not been proved. It is not certain that legal status would deter NGOs from using informal means, as they have been using, in the prosecution of their roles.[272] It was suggested that allowing NGOs to regulate themselves will ensure transparency and credibility of information presented.[273] A contrary approach is to empower an independent body - for instance, the Human Rights Commission in the case of human rights NGOs - to monitor and regulate NGOs.[274]

Arguably, while the formal recognition of NGOs is not without its own problems (such as loss of flexibility, administrative bureaucracy and crippling of activities due to too much regulation), self-regulation does not present a complete solution to the problem. Self-regulation raises such issues as, which of the NGOs shall set the standards to be followed and which enforcing body shall enforce the standards? A dual approach is arguably a better option. NGOs can form themselves into a network or coalition for the purpose of formulating rules of self-censorship. IGOs should establish minimum standards of accountability, which NGOs should abide by. Each NGO and the information it presents should be assessed by IGOs on the basis of the minimum standards.[275] Non-compliance with these minimum standards may be punished by a reduction in participation or other rights and privileges given to the NGOs.

---

[270] For a full discussion of the pros and cons of formalization, see Emanuele Rebasti & Luisa Vierucci, *supra* note 249 at 4-10.

[271] Gianluca Rubagotti, "The Role of NGOs Before the United Nations Human Rights Committee" (hereinafter Gianluca Rubagotti, "The Role of NGOs") in Tullio Treves *et al*, eds., *Civil Society, supra* note 257, 67 at 92.

[272] Emanuele Rebasti & Luisa Vierucci, *supra* note 263 at 7.

[273] *Ibid.*

[274] Gianluca Rubagotti, "The Role of NGOs" in Tullio Treves *et al*, *Civil Society, supra* note 257 at 92.

Notwithstanding the above-stated arguments on the legal status of NGOs, the influence of NGOs in achieving compliance cannot be over-emphasized. Some treaties depend almost exclusively on NGOs to be effective. For instance, the effective operation of CITES in protecting the fauna and flora depends heavily on the role of NGOs like TRAFFIC and the IUCN.[276]

The foregoing discussion in this part forms the basis of the discussion in the subsequent parts. A thorough understanding of the theories of compliance and its relevance to a model compliance strategy, the means of achieving compliance generally, and the players in the international field of compliance is necessary for an understanding of compliance mechanisms in some environmental treaties such as the *Montreal Protocol*, the *Kyoto Protocol* and *CITES*. Part III, therefore, examines the compliance mechanisms in these treaties with a view to highlighting the mechanisms that should be incorporated in the *Basel Convention*.

---

[275] See Dan Tarlock, *supra* note 256 at 383.
[276] See generally Rosalind Reeve, *supra* note 203.

PART III COMPLIANCE MECHANISMS IN OTHER ENVIRONMENTAL TREATIES

3.1 Montreal Protocol

The scientific discovery of a hole in the ozone layer in 1985 led to a global effort to find solutions to the causes of the depletion of the ozone layer.[277] The depletion of the ozone layer was linked to the accumulation of chlorine, carbon, fluorine (CFCs), halons and hydrogen (collectively, the ozone-depleting substances (ODS)) from industrial activities.[278] To coordinate efforts in solving the problem of ozone depletion, the *Vienna Convention for the Protection of the Ozone Layer*[279] was negotiated and concluded on March 22, 1985. The *Vienna Convention* encourages cooperation on research, systematic observation of the ozone layer, information exchange and the adoption of protocols to combat the problem of ozone depletion.[280] The adoption of the *Vienna Convention* is very significant: it signified an international consensus to combat a global problem in the absence of scientific certainty.[281]

Further scientific evidence of the ozone destruction led to negotiations on the *Montreal Protocol*[282] and its adoption on September 16, 1987. The aim of negotiating the *Protocol* was to achieve a phase out of the production and consumption of ODS by both developed and developing nations. To achieve this, different timelines were given to the developed and the developing nations to phase out their ODS production and consumption.[283]

---

[277] See Stephen Andersen & K. Madhava Sarma, *Protecting the Ozone Layer: The United Nations History* (London: Earthscan, 2002), 18-22. The ozone layer is the thin layer, comprising three oxygen atoms, that protects the earth from the harmful effects of ultraviolet radiation. See Duncan Brack, *supra* note 228 at 209 – 10.

[278] See Stephen Andersen & K. Madhava Sarma, *supra* note 277 at 18-22.

[279] March 22, 1985, 1513 UNTS 323 effective September 22, 1988 online: UNEP website < http://www.unep.ch/ozone/pdfs/viennaconvention2002.pdf > (hereinafter Vienna Convention).

[280] *Vienna Convention, supra* note 279, Art. 2.

[281] Duncan Brack notes that it is "probably the first example of the acceptance of the 'precautionary principle' in a major international negotiation." See Duncan Brack, *supra* note 228 at 211.

[282] *Supra* note 11.

To ensure that parties comply with the provisions of the *Montreal Protocol*, the *Protocol* requires the parties to report data on their production[284] and consumption[285] of each of the controlled substances.[286] To ease the difficulties associated with reporting, the Secretariat developed a database wherein raw data provided by parties are entered and calculations, based on the data provided, are automatically made by the database. Parties provide the required data by filling out the relevant standard forms, which are submitted to the Secretariat.[287] The only problem with this system is that there may be false presentation of data and input errors by parties.[288] Accuracy of data depends a lot on a country's system of collecting data. Sebastin Oberthür noted that parties might rely on information provided by importers, exporters, producers, or information generated through the licensing system, or customs data, which results in varying degrees of accuracy.[289] This problem is increased by the lack of a formal verification procedure in the *Montreal Protocol*. Verification only exists for data provided by the Annex 5 countries (developing countries) that are given financial assistance under the *Protocol.*[290]

---

[283] The developed nations had a timeline of 1996 for a complete phase out of CFCs from the 1986 levels and 2005 for a phase out of consumption of all categories of ODS except HCFCs. The HCFCs were exempted because they are needed in the servicing of air conditioning and refrigeration equipments and there are currently no substitutes for them. However, a phase-out schedule has been adopted for the HCFCs and other ODS. See Montreal Protocol, Art. 2A; online: Ozone Secretariat website < http://www.unep.ch/ozone/Treaties_and_Ratification/2Biii_1summary_controls_measures.asp >. See also Duncan Brack, *supra* note 228 at 212.

[284] This refers to the total amount of controlled substances produced minus any amounts used as feedstock or manufacturing agent, or destroyed. Production excludes materials for re-use or recycle. See *Montreal Protocol, supra* note 11, Art.1 (5).

[285] Consumption is defined as production plus imports minus exports of the controlled substances. See *Montreal Protocol, supra* note 11, Art.1 (6).

[286] *Montreal Protocol, supra* note 11, Art. 7.

[287] See the *Handbook on Data Reporting Under the Montreal Protocol,* online: UNEP website < http://ozone.unep.org/pdfs/Handbook-on-Data-Report-from-UNEP-TIE.pdf>.

[288] See Duncan Brack, *supra* note 228 at 215-16.

[289] Sebastin Oberthür, *Production and Consumption of Ozone-Depleting Substances 1986-1999: The Data Reporting System of the Montreal Protocol,* 19 cited in Duncan Brack, "Monitoring the Montreal Protocol", *supra* note 228, at 215.

The establishment of a financial mechanism (a Multilateral Fund) to assist developing countries in meeting their phase-out commitments also enhances parties' compliance.[291] Without the financial incentives provided from the Multilateral Fund, many States, especially developing States, would find it difficult complying with their commitments under the Protocol.[292] The financial aid is geared towards funding the incremental costs of using or converting to non-ODS technologies and may be in the form of grants, concessional loans or technology transfers.[293] Qualification for financial aid is dependent on the developing countries' per capita consumption and production of ODS.[294]

Liquidity of the Fund is central to its operation. That is why the Multilateral Fund is funded by the developed or non-Article 5 parties based on the United Nations Scale of Assessment.[295] Contributions to the Fund by the non-Annex 5 party members of the *Montreal Protocol* should ordinarily ensure the liquidity of the Fund. Unfortunately, this is not the case, as most of the developed nations lag behind in the payment of their contributions.[296] This state of affairs is expected, as there are other competing pressures on nations' finances.[297] Without the constant intervention of the Global Environmental Facility (GEF),[298] the Multilateral Fund will find it difficult to meet its objectives and the *Montreal Protocol* will not be as successful as it is hoped to be in reducing ODS production and consumption.[299]

---

[290] Duncan Brack, *supra* note 228 at 216. This verification of data is conducted before the financial assistance is given to the Annex 5 State.

[291] David Victor notes "Countries that face little internal incentive to change their behavior can be induced into action if others pay the bill". See David Victor, *supra* note 183 at 161.

[292] *Ibid.*

[293] See James Andrew Bove, *supra* note 210 at 406-407. See also online: Multilateral Fund website < http://www.multilateralfund.org/about_the_multilateral_fund.htm >.

[294] This is fixed at less than 0.3kg per year. See *Montreal Protocol*, *supra* note 11, Art. 5.

[295] Secretariat of the Multilateral Fund for the Implementation of the Montreal Protocol, *Home page information,* online: Multilateral Fund website < http://www.multilateralfund.org/homepage.htm >. The United Nations Scale of Assessment determines, on the basis of gross national product, the percentage of funding that each country must contribute to the U.N. budget. The scale is determined every three years. See James Andrew Bove, *supra* note 210 at 407 including fn. 38.

Another mechanism used in ensuring parties' compliance with the *Montreal Protocol* is trade sanctions.[300] Trade sanctions or restrictions serve two purposes. They ensure maximum participation by excluding non-parties from trading in the controlled products and they ensure that parties do not "migrate" to the non-parties position in order to escape the phase-out schedules.[301] The trade sanctions in the *Montreal Protocol* involve bans on the importation and exportation of the controlled substances from non-parties and the transfer of technology for producing the controlled substances to non-parties.[302] Exceptions, however, exist for non-parties that agree to be bound by the substantive provisions set out in Article 2.[303]

---

[296] Apart from delaying in the payment of their contributions, some of the parties use promissory notes, which is a mere acknowledgment of indebtedness, in paying. See James Andrew Bove, *supra* note 210 at 441-445.

[297] See Editors of Harvard Law Review, *Trends in International Environmental Law, supra* note 204 at 100. See also the discussion in section 2.2B *supra*.

[298] The GEF is a global financial institution established in 1991 to aid developing countries in funding projects that protect the environment and reduce environmental degradation. One of its project areas is ozone deterioration, hence its constant provision of grants to developing countries to aid in their elimination of ODS production and consumption. It has seven executing agencies that help in the execution of its financing projects: UNIDO, FAO, ADB, AFDB, ERBD, IDB, and IFAD. See online: GEF website < http://www.gefweb.org >.

[299] See Duncan Brack, *supra* note 228 at 212.

[300] The first explicit trade sanction in the Montreal Protocol is the ban on trade with non-parties. (Montreal Protocol, *supra* note 10, art. 4). Other trade sanctions include the licensing system for trade between parties and the export ban on recycled ODS products from parties in non-compliance. See *Amendment to the Montreal Protocol Adopted by the Ninth Meeting of the Parties,* 1997 effective November 10, 1999 online: Ozone Secretariat website < http://www.unep.ch/ozone/Treaties_and_Ratification/2Bi_3_Montreal_amendment.asp >.

[301] Duncan Brack, *supra* note 228 at 220. Duncan Brack opines further that the issue of migrating to the non-parties status did not arise as the ODS alternatives proved to be cheaper than the ODS.

While the use of trade sanctions contributed to the achievement of the objectives of the *Montreal Protocol*,[304] it is not clear whether such sanctions will be allowed in newer treaties in view of the globalization of trade.[305] The use of trade sanctions in modern days is more likely to offend the World Trade Organization (WTO) Rules.[306] As stated earlier, the GATT/WTO Rules require that 'like products' from parties be treated alike,[307] similar products imported from other countries be accorded the same treatment as the domestic products in terms of internal taxes and regulation,[308] and there should be no quantitative restrictions other than duties and taxes on imported or exported products.[309] Restricting trade in "similar products" from countries on the basis of membership of a multilateral agreement likely offends GATT Articles I, III, and XI.

---

[302] *Montreal Protocol*, *supra* note 11, Art. 4.

[303] *Ibid.* at Art. 4(8).

[304] It is important to point out that the effectiveness of the Montreal Protocol did not depend solely on the trade measures. In fact, determining the sole contribution of the trade measures to the effectiveness of the Protocol is a difficult task. This notwithstanding, the party/non-party trade restriction acted as a strong disincentive for any party to remain outside the Protocol thereby, ensuring universal participation in treating a global problem. For instance, the Republic of Korea was induced into becoming a party in order to avoid being "shut out of the Western markets". See OECD, *Trade Measures in MEA, supra* note 48 at 21; Duncan Brack, *supra* note 228 at 220. See also Duncan Brack, *International Trade and the Montreal Protocol,* (London: Royal Institute of International Affairs/ Earthscan, 1996) for a discussion of the history and operation of the trade measures.

[305] See David Wirth, *supra* note 50 for a discussion of the potential conflict between trade restrictions in Multilateral Environmental Agreements (in this case, the *Basel Convention*) and WTO/GATT Rules. See also the discussion in part 1 of this paper and OECD, *Trade Measures in MEA, supra* note 48.

[306] Duncan Brack, *International Trade and Climate Change Policies,* (London: Royal Institute of International Affairs/ Earthscan, 2000) 18 (hereinafter Duncan Brack, *International Trade*).

[307] This is what is known as the "Most Favoured Nation" treatment in GATT 1947 as amended, Article 1.

[308] See GATT 1947 (amended) *supra* note 49, Art. III.

[309] GATT 1947 (amended), *supra* note 49, Art. XI.

Arguably, use of trade sanctions for environmental protection should be allowed as an exception under the WTO Rules.[310] Article XX of GATT/WTO Rules exempts necessary measures taken to protect human, animal or plant life; to secure compliance with laws or regulations that are not inconsistent with the provisions of GATT; and to conserve exhaustible natural resources provided that the measure taken is in conjunction with domestic restrictions on production or consumption.[311] Though it may be argued that the trade sanction is a necessary measure taken to protect life or to conserve natural resources, the argument can only be sustained if the measure taken does not constitute "an arbitrary or unjustifiable discrimination between countries" with similar conditions nor "a disguised restriction on international trade".[312] Determining the satisfaction of these conditions may be problematic, especially determining the necessity of the measure taken.[313] To this, the OECD has suggested that the existence of an international consensus on the validity and the necessity of the measure taken to achieve the objective of a multilateral environmental agreement (MEA) may raise a "rebuttable presumption" in favour of the necessity of such a measure.[314]

In the light of the foregoing arguments, the trend in the *North American Free Trade Agreement* (NAFTA) - to which Canada, US and Mexico are parties - may seem a better option.[315] NAFTA expressly allowed trade restrictions in certain treaties – the *Basel Convention, Montreal Protocol,* and *CITES* – to override the provisions of NAFTA in cases of inconsistency between its provisions and those of the treaties.[316] A provision expressly allowing trade restrictions in environmental agreements (as is in NAFTA) would be better than a provision allowing trade restrictions under less clear conditions (as in WTO/GATT Rules).

---

[310] See generally David A. Wirth, *supra* note 50.

[311] Paras. b , d, and g.

[312] See the Introductory paragraph to GATT, Art. XX.

[313] OECD in their working papers noted: "Given that the MEAs are also a reflection of the views of the international community, it is not clear how far a WTO Panel would inquire into the specific requirements of Article XX in case of a trade measure taken under an Agreement". See OECD, *Trade Measures in MEAs, supra* note 48 at 35.

[314] *Ibid.*

It is important to note that restriction of trade where there is an inadequate enforcement mechanism in place, and a continuing demand and supply for the product being restricted, leads to illegal trading in that product.[317] With ODS, illegal trading is increasing because the CFCs are still needed to service older refrigerators and other cooling equipment and the approved or recycled CFCs are not sufficient to provide the service.[318] In recognition of the consequences of restricting trade in ODS and other regulated products, the parties in Montreal introduced a licensing system.[319] The licensing system was introduced as Article 4B to the Montreal Protocol to track trade in the regulated products between parties.[320] The target is to reduce the amount of illegal trade in the regulated products by tracking all imports and exports of the products. However, the effectiveness of the licensing system depends a lot on the concerted efforts of those States engaged in the trading of the CFCs such as European States, the United States, Russia, and China.[321] Such efforts include "better training of customs agents, closer interagency, international collaboration to detect and follow up on illegal activity, and stricter penalties for those caught trafficking in black market CFCs".[322]

---

[315] December 17, 1992, 32 ILM 289,605 (1993), effective 1/1/1994 online: NAFTA Secretariat website < http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 >.

[316] NAFTA, *supra* note 315, Art. 104.

[317] OECD, *Trade Measures in MEA, supra* note 48 at 27.

[318] World Resources Staff, "Stratospheric Ozone Depletion: Celebrating Too Soon", (1998) World Resources 1 at 2 online: World Resources Institute Website < http://earthtrends.wri.org/pdf_library/features/cli_fea_ozone.pdf > (hereinafter World Resources Staff, "Stratospheric Ozone Depletion").

[319] The licensing system was introduced as an amendment to the Protocol (Article 4B) in 1997. See *Amendment to the Montreal Protocol adopted by the Ninth Meeting of the Parties, supra* note 300.

[320] Article 4B requires parties to establish and implement a licensing system for the importation and exportation of any new, used and recycled products. Article 4B also gives a grace period to developing parties who cannot establish the licensing system in 2000. They were allowed an extension to 2005 and 2002 for products in Annexes C and E respectively.

Apart from its substantive compliance tools or provisions, the *Montreal Protocol* also has a non-compliance procedure (NCP) for dealing with non-compliance by parties. The NCP, established pursuant to Article 8, uses a non-confrontational and transparent approach (a managerial approach) in dealing with parties' non-compliance.[323] The NCP is triggered by a submission of non-compliance by a State, either on its behalf or on behalf of another State, to the Secretariat who forwards it to the Implementation Committee (IC).[324] The Committee members and the representatives of the Montreal Secretariat deliberate over the submission after hearing the relevant parties and makes recommendations to the COP.[325] The final decision in respect of any submission made to it rests with the COP. The decision becomes effective if adopted by the COP.[326] While this requirement clutters the agenda of parties at meetings,[327] it also raises the possibility of parties regarding the IC as unimportant. The fact that every decision of the Committee is subject to COP approval, with the COP having complete veto powers, may make the parties feel that the IC is a toothless bulldog and that deliberations by the IC is a worthless venture to embark on.

---

[321] World Resources Staff, "Stratospheric Ozone Depletion", *supra* note 318 at 2.
[322] *Ibid.* at 3.
[323] See David Victor, *The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure* (Austria: International Institute for Applied Systems Analysis, 1996) 5 (hereinafter David Victor, *Early Operation and Effectiveness*).
[324] The Implementation Committee (IC) has ten members, five from the non-Article 5 parties and five from the Article 5 parties, serving in a representative capacity.
[325] David Victor, *Early Operation and Effectiveness, supra* note 323 at 5-6.
[326] Duncan Brack notes that the COP rarely rejects any recommendation made by the IC. See Duncan Brack, *supra* note 228 at 219.
[327] Duncan Brack noted that recommendations from the IC are taking a larger portion of the COP agenda. See Duncan Brack, *supra* note 228 at 218.

In addition, the IC deals with other issues of non-compliance presented to it by the Secretariat. For instance, the IC works to detect parties that are not in compliance with their data reporting by reviewing the reports on data reporting presented to it by the Secretariat. It then invites the party concerned to make representations before it on the reasons for its non-compliance and then works with the party in developing its action plan for compliance.[328]

It is important to note that NGOs and other international institutions do not attend the meetings of the IC.[329] Attendance is restricted to the parties concerned, the Secretariat, the Multilateral Fund representative and any other invited party.

The Montreal Protocol's Non-Compliance Procedure has been applauded for its success in getting parties to comply.[330] However, international scholars have treated this success with skepticism.[331] The arguments are that the NCP has only achieved partial success. Its success is evident in cases where the parties found it easy to comply and its failure is seen in cases where compliance by parties is difficult.[332] For instance, it has been difficult to get developing states to comply with the Protocol especially in their reporting of data. Goldberg *et al* noted that compliance with data reporting, which has always been a problem under the Protocol, has not been resolved by the NCP.[333]

---

[328] David Victor, *Early Operation and Effectiveness, supra* note 323 at 9-10. See also Duncan Brack, *supra* note 228 at 217.

[329] Non-attendance of the NGOs at the IC's meetings does not exclude them from seeking to influence Committee members on some issues for deliberations. See David Victor, *Early Operation and Effectiveness, supra* note 323 at 7.

[330] Duncan Brack noted that the Montreal Protocol's compliance system is "rightly regarded as a model worthy of emulation". See Duncan Brack, *supra* note 228 at 224.

[331] David Victor, *Early Operation and Effectiveness, supra* note 323 at 38. David Victor notes: "The work of the Committee probably has a wider effect deterring noncompliance, but that has been difficult to substantiate". See also Donald L. Goldberg *et al*, "Effectiveness of Trade and Positive Measures in Multilateral Environmental Agreements: Lessons from the Montreal Protocol", a CIEL paper prepared for UNEP, online: CIEL Website < http://www.ciel.org/Publications/EffectivenessofTradeandPosMeasures.pdf > 29.

3.2 The Kyoto Protocol

The third Conference of the Parties (COP-3) to the *United Nations Framework Convention on Climate Change*[334] (UNFCCC) adopted the *Kyoto Protocol*[335] in December 1997. The basis for the negotiation and adoption of the *Kyoto Protocol* was a recognition by parties to the UNFCCC that more efforts were needed to stabilize the emission of green house gases (GHG) which cause global climate change, and that more binding commitments were needed to achieve this goal.[336] The *Kyoto Protocol,* therefore, aims at reducing the amount of GHG produced and emitted by industrialized nations by setting out emissions reduction targets for the industrialized states and specifying mechanisms for compliance and monitoring of performance.[337] The parties to the UNFCCC did not agree on the details of implementation, of enforcement and of compliance with the Protocol. The Conference of the Parties serving as the meeting of the Parties (COP/MOP) was mandated to negotiate and decide on implementation and compliance with the Protocol.[338] This has resulted in the development of a number of guidelines, rules and procedures for the implementation of some of the provisions of the *Protocol*. Examples include the Buenos Aires Plan of Action,[339] the Bonn Agreement,[340] and the Marrakesh Accords.[341]

---

[332] David Victor, *Early Operation and Effectiveness, supra* note 323 at 36.

[333] Donald L. Goldberg *et al, supra* note 331 at 29.

[334] *Supra* note 240.

[335] *Supra* note 12.

[336] Jutta Brunnée, "A Fine Balance", *supra* note 176 at 225. See also Jutta Brunnée, "Kyoto Protocol: Testing Ground", *supra* note 114.

[337] The emissions reduction commitments of the industrialized nations, referred to as the Annex I states, are stated in Article 3 of the Protocol. Annex I parties are enjoined to ensure both individually and collectively, that their aggregate emissions of GHG do not exceed their assigned amounts and that their overall emissions of GHG are reduced by at least 5% below the 1990 levels. The mechanisms instituted to ensure the achievement of the objectives of the *Kyoto Protocol* are the Joint Implementation, Clean Development mechanism and the Emissions Trading mechanism. See the *Kyoto Protocol, supra* note 12, Articles 6, 12, and 17.

Three mechanisms – Joint Implementation (JI),[342] the Clean Development mechanism (CDM),[343] and Emissions Trading (ET)[344] -- collectively called the Flexibility Mechanisms -- are central to the operation of the Protocol. The most controversial of these mechanisms is the emissions trading. The ET mechanism, unlike the JI and the CDM (which involve the allocation of credits to a State for the actual amount of emissions reduced), involves sales or acquisitions of individual State's assigned emissions amounts using market dynamics. Thus, an industrialized State that is finding it difficult to meet the cost of complying with its commitments can buy another State's emission units.[345] The possibility of buying another State's emission units provides the incentive for the industrialized State to stay in compliance, but it may also result in the selling State selling more than its assigned amount, especially where there is no efficient tracking system to keep a record of the parties' transaction.[346]

---

[338] See Articles 3(4), 5(1), 6(2), 7(4), 12(7), 16, 17, and 18 of the *Kyoto Protocol, supra* note 12.

[339] *Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Fourth Session,* Decision 8/CP.4., UN.FCCCOR, 1998, U.N Doc. FCCC/CP/1998/16/Add.1.

[340] *Report of the Conference of the Parties on the Second Part of its Sixth Session Held at Bonn from 16 to 27 July 2001,* Decision 5/CP.6, UNFCCCOR, 2001, U.N. Doc.FCCC/CP/2001/5.

[341] *Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Seventh Session,* UNFCCCOR, 2001, U.N Doc. FCCC/CP/2001/13/Add. 1-3.

[342] See *Kyoto Protocol supra* note 12, Art. 6.

[343] *Ibid.* at Article 12.

[344] *Ibid.* at Art. 17.

[345] Jutta Brunnée, " Kyoto Protocol: A Testing Ground", *supra* note 114 at 269.

To ensure that parties comply with their reduction commitments under Article 3, the *Protocol* requires the parties to establish a national system for estimating "anthropogenic emissions by sources and removal by sinks of all greenhouse gases not controlled by the *Montreal Protocol*"[347] and a national registry for accurate accounting of emission units.[348] The establishment of this national system ensures that parties keep accurate records of emissions and fulfill their annual reporting requirements under Article 7.[349] Also, submission of the annual reports and establishment of the national system, are made conditions for eligibility to participate in the Flexibility Mechanisms.[350] The reports submitted by the parties are subject to verification by expert review teams, under article 8. A supervisory committee was also set up to monitor parties' compliance with article 6.[351]

---

[346] *Ibid.* at 269-70. Jutta Brunnée concludes: "…the success or failure of the Kyoto Protocol's market-based mechanisms – indeed, of the Protocol - depends to a considerable extent on the balance struck in the rules that govern these mechanisms. For the trading regime to gain and maintain momentum, the mechanism rules must allow for efficient transactions. Yet, if the rules are too lenient, incentives might exist for abuse, ultimately leading to the breakdown of the mechanisms".

[347] *Kyoto Protocol, supra* note 12, Art 5 (1).

[348] "Modalities for accounting of assigned amounts under Article 7, paragraph 4 of the Kyoto Protocol", COP Decision 19/CP.7, FCCC/CP/2001/13/Add.2, *Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October -10 November, 2001*, 55.

[349] Detailed guidelines to guide the parties in complying with Articles 5 and 7 are contained in the Marrakesh Accords. See *Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October to 10 November, 2001*, FCCC/CP/2001/13/Add.3, online: UNFCCC website < http://unfccc.int/resource/docs/cop7/13a03.pdf#page=64 >.

[350] *Principles, nature and Scope of the Mechanism pursuant to Articles 6, 12 and 17 of the Kyoto Protocol* COP Decision 15/CP.7, Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October -10 November, 2001, 2.

[351] See *Guidelines for the Implementation of Article 6 of the Kyoto Protocol*, COP Decision 16/CP.7 FCCC/CP/2001/13/Add.2, Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October -10 November, 2001, 5 online: UNFCCC website < http://unfccc.int/resource/docs/cop7/13a02.pdf#page=5 >.

Apart from setting up a machinery for monitoring and verifying party compliance with specific provisions of the *Protocol*, the parties to the *Protocol* also set up a Compliance Committee with facilitative and enforcement functions.[352] Thus, the Compliance Committee functions through a plenary, a bureau and two branches – the Facilitative Branch and the Enforcement Branch.[353] The Facilitative Branch advises and assists the parties in complying with their commitments taking into account the principle of common but differentiated interest.[354] It deals with questions concerning difficulties in compliance. The Enforcement Branch, on the other hand, determines whether a party is in non-compliance and then applies the stated consequences of non-compliance to the party.[355]

It is important to note that specific consequences, which the Enforcement Branch can impose on the non-complying party, are outlined in the Marrakesh *Procedures and Mechanisms*[356] thus eliminating any kind of uncertainty as to the consequences that will follow any act of non-compliance. The consequences include: a declaration of non-compliance by the Enforcement Branch and a requirement for the development of a plan of action to ensure compliance by the non-compliant State, a suspension of eligibility to participate in the Flexibility Mechanisms, and a deduction from the State's assigned amount of emission units in the next commitment period.[357]

---

[352] See Art. 2, *Procedures and Mechanisms relating to Compliance under the Kyoto Protocol,* Decision 24/CP.7 FCCC/CP/2001/13/Add.3, Report of the Conference of the Parties on its Seventh Session, held at Marrakesh from October 29 to November 10, 2001, online: UNFCCC website < http://fccc.int/resource/docs/cop7/13a03.pdf#page=64 > (hereinafter Marrakesh *Procedures and Mechanisms)*.
[353] *Ibid.* at II(2).
[354] *Ibid.* at IV (4).
[355] *Ibid.* at V (4)-(6).
[356] *Supra* note 352.
[357] Marrakesh *Procedures and Mechanisms, supra* note 352 at XV.

A number of features make the Kyoto compliance regime unique. The membership of the Compliance Committee is drawn from both the Annex I (developed) States and the non-Annex I (developing) States. Also, decisions of the Enforcement Branch of the Committee require a majority of both Annex I and non-Annex I parties and the decisions of the Enforcement Branch apply without any need for endorsement by the COP/MOP.[358] Though appeals are allowed, any appeal submitted to the COP/MOP can only be on grounds of procedural irregularities.[359] This provision ensures that there is finality in the decisions of the Enforcement Branch. The requirement that decisions be reached by a majority of Annex I and non-Annex I parties ensures that no one group solely determines the decisions on non-compliance.[360] Also, the non-compliance procedure can be triggered by the expert review teams under Article 8 of the *Protocol*, or by a party, either in relation to itself (self reporting) or to another party.[361]

The non-compliance procedure established under the Kyoto *Procedures and Mechanisms* has been applauded for its innovativeness and ambitiousness.[362] It is the first multilateral environmental agreement that combines the managerial approach and the enforcement approach to compliance,[363] even though the sanctions, arguably, only have a minor deterrent effect.[364]

---

[358] Marrakesh *Procedures and Mechanisms, supra* note 352 at II(8)-(9).
[359] *Ibid.* at XI.
[360] Jutta Brunnee opines that this requirement satisfies both groups as any contrary requirement would have been unacceptable to the Annex I parties who would feel that non-Annex I parties, who do not have any commitment under the Protocol, are controlling proceedings. See Jutta Brunnee, "Kyoto Protocol: A Testing Ground", *supra* note 114 at 276.
[361] Marrakesh *Procedures and Mechanisms, supra* note 352 at VI (1).
[362] See Glenn Wiser, "Kyoto Protocol Packs Powerful Compliance Punch" (2002) 25:2 Int'l Envt'l Rep. 86 online: CIEL website < http://www.ciel.org/Publications/INER_Compliance.pdf >; Hermann. E. Ott, "Climate Policy After Marrakesh Accords: From Legislation to Implementation" online: Wuppertal Institute website < http://www.wupperinst.org/download/Ott-after-marrakesh.pdf >.

Notwithstanding its inventiveness, the non-compliance procedure is riddled with problems that undermine its effectiveness. A major problem relates to the status of the Marrakesh *Procedures and Mechanisms,* bearing in mind that Article 18 requires that parties amend the *Kyoto Protocol* if they intend the non-compliance procedure to have binding consequences.[365] Jutta Brunnée argues that the legal form of the Marrakesh *Procedures and Mechanisms* is immaterial as it is not certain that making it binding would significantly enhance its effectiveness.[366] Contrary to Brunnée's argument, the binding nature of the Marrakesh *Procedures and Mechanisms* determines the compliance rate, which ultimately affects its effectiveness. This means that the binding nature of the Marrakesh *Procedures and Mechanisms* gives it a compliance pull, which compels States into compliance or into justifying their non-compliance.[367] It is therefore important that the Marrakesh *Procedures and Mechanisms* be in a binding form. The only snag, as noted by Brunnée, would be that parties might withdraw from the non-compliance procedure when an amendment and ratification is sought.[368]

---

[363] See Jacob Werksman, "The Negotiation of a Kyoto Compliance System" in Olav Stokke *et al, Implementing the Climate Regime, supra* note 260, 17 at 22-23 for a discussion of the factors that necessitated an adoption of both the enforcement procedure and the managerial procedure.

[364] Matthews Vespa, "Climate Change 2001: Kyoto at Bonn and Marrakech", (2002) 29 Ecology L.Q, 395 at 415.

[365] Jutta Brunnee, "Kyoto Protocol: Testing Ground", *supra* note 114 at 276-77.

[366] Jutta Brunnee concludes: "In short, it is not clear that adoption of the *Procedures and Mechanisms* in legally binding form would significantly enhance their effectiveness… Insistence on adoption of the *Procedures and Mechanisms* by amendment merely allows parties to opt out of the compliance regime. Thus, adoption by simple decision, applicable to all parties, may well be more likely to create a successful compliance regime". See Jutta Brunnee, "Kyoto Protocol: Testing Ground", *supra* note 114 at 278.

[367] See the discussion in part 2.1(B) and footnote 179 above.

Other problems include: the tendencies of parties to submit reports not based on measurement of gas emissions but on their estimation of gas emissions;[369] the ability of parties to evade implementation reviews by the expert teams by positing a compliance stance (the parties know what the expert review teams look for and they try to show compliance by making sure everything is in order);[370] the suspicion that the personal interests of the members of the Enforcement Branch will influence any decision they arrive at;[371] and the seemingly weak deterrent nature of the consequences of non-compliance.[372]

3.3 CITES

A recognition that fauna and flora are an "irreplaceable part of the natural systems of the earth"[373] and that continuous trade in them may lead to their extinction, led to the negotiation of CITES[374] and its adoption on March 3, 1973. Thus, the basic aim of setting up CITES was to ensure that international trade in wild animals and plants does not lead to their extinction.[375] To achieve its aim, parties are required, upon satisfaction of certain conditions and requirements, to issue certificates and permits for any imported, exported, re-imported or transported specimens of the regulated species of wild animals and plants.[376]

---

[368] *Ibid.*
[369] See Ronald Mitchell, "Flexibility, Compliance and Norm Development in the Climate Regime" in Olav Stokke *et al, Implementing the Climate Regime, supra* note 260, 65 at 71.
[370] *Ibid,* at 72. Mitchell argues therein that the parties already know what the review process entails thus they ensure that they are not caught by bringing themselves into compliance.
[371] See Catherine Hagem & Hege Westskog, "Effective Enforcement and Double-Edged Deterrents: How the Impact of Sanctions Also Affect Complying Parties", in Olav Stokke *et al, Implementing the Climate Regime, supra* note 260, 107 at 107-108.
[372] Unfortunately, the sanctions that the Enforcement Branch are empowered to impose are not punitive. A defaulting party is merely required to present a development plan of compliance. See *Procedures and Mechanisms, supra* note 352 at XV.
[373] See CITES *supra* note 13, Preamble 1.
[374] *Supra* note 13.

The requirements for the issuance of permits and certificates are stated in Article VI though it has been amended over the years.[377] The requirements include: a control number, a description of the specimens in accordance with the approved list of descriptions, the source of the specimens and the purpose of shipment, the signatures of the authorized signatories notified to the CITES Secretariat, and a description of the markings on the specimens (specimens could be marked using indelible ink, tags, rings or microchips.[378] To ensure full compliance, the parties adopted standard permits and certificates forms. The essence of the permits and certificates is to ensure that a record of all trade in such specimens is kept for tracking and other purposes.[379]

To ensure that parties comply with the provisions of the *Convention*, it requires parties to submit annual and biennial reports of trade in the regulated species of wild animals and plants.[380] For easy compilation of reports, the *Convention* provides parties with guidelines on report compilation.[381] Despite the provision of guidelines on reporting, parties do not seem to take reporting seriously; hence, the late filing of reports, incomplete reports, and the filing of reports contrary to the guidelines.[382] The nonchalant attitude of parties towards their reporting obligations led the COP and the Standing Committee of the Convention to recommend the imposition of trade sanctions on the non-complying parties.[383] The trade measures are in the form of a temporary suspension of trade relations for a specific period of time with the non-complying party until that party comes into compliance.[384] Whether this measure is sufficient to deter non-complying States still remains to be seen, but it is a step in the right direction.

---

[375] See CITES information leaflet: "What is CITES?" online: CITES website <http://www.cites.org/eng/disc/what.shtml >.

[376] See CITES, *supra* note 13, Art. III-VI. The parties have modified the requirements on issuance of permits and certificates. See *Permits and Certificates,* Conference of the Parties resolution, Conf.12.3 (Rev. COP13), Twelfth Meeting of the COP, Santiago Chile, Nov. 3-15, 2002, online: CITES website < http://www.cites.org/eng/res/12/12-03R13 >.

[377] The most recent requirements are contained in CITES Resolution Conf. 12.3 (Rev. COP 13) "Permits and Certificates", resolution of the 12th meeting of the COP, Santiago (Chile) 3-15 November 2002, online: CITES website < http://www.cites.org/eng/res/12/12-03R13.shtml > .

[378] *Ibid.* See also Rosalind Reeve, *supra* note 203 at 32-34.

[379] Rosalind Reeve, *supra* note 203 at 32 notes that the scheme of permits and certificates required under the Convention forms the "central pillar" of CITES trade control systems.

[380] Art. VIII (7).

Apart from the information gathered from self-reports by parties, the *Convention* relies a lot on external sources such as NGOs. A number of NGOs, including the World Conservation Union (formerly International Union for Conservation of Nature and Natural Resources (IUCN)),[385] TRAFFIC (Trade Records Analysis of Flora and Fauna in Commerce),[386] and World Wildlife Fund for Nature (WWF)[387] provide independent reports of parties' compliance with the Convention.[388] The information obtained from the NGOs serves as a way of verifying the data submitted by the parties and it fills gaps omitted by the parties. For instance, TRAFFIC's Bad Ivory Database System (BIDS) established in 1992 provides a data base for collecting information on seizures of elephant ivory and other elephant products under the Elephant Trade Information System (ETIS) program.[389]

---

[381] The data collected is maintained in a database controlled by the World Conservation Monitoring Centre (WCMC), under a contract entered into with CITES secretariat. See Rosalind Reeve, *supra* note 203 at 63.

[382] Rosalind Reeve, *supra* note 203 at 64 - 66.

[383] CITES Secretariat, "Parties Currently subject to a Recommendation to Suspend Trade" online: CITES website < http://www.cites.org/eng/news/sundry/trade_suspension.shtml >.

[384] As at January 22, 2007, about 32 States are on the list of recommendation for trade suspension. See CITES Secretariat, "Parties Currently subject to a Recommendation to Suspend Trade", *supra* note 383.

[385] See their website < http://www.iucn.org >.

[386] See their online publications at < http://www.traffic.org >.

[387] See their website < http://www.wwf.org> or < http://www.panda.org >. See Philippe Sands, "The Role of NGOs", in William E. Butler, ed., *supra* note 249, 61 at 65 –66 for a discussion of the role of WWF in CITES.

[388] See Alexandre Kiss & Dinah Shelton, *supra* note 237 at 304. See also the discussion in part II above.

In addition to providing information on parties' non-compliance, NGOs such as IUCN, TRAFFIC and WWF cooperate and assist the Secretariat in the implementation of some of its programmes.[390] The legal basis for this partnership is in Article XII of CITES, which permits the Executive Director of UNEP, in his or her role of providing for the Secretariat, to be "assisted by suitable inter-governmental or non-governmental, international or national agencies or bodies technically qualified in protection, conservation and management of wild fauna and flora". This has led to the development of a close relationship between the Secretariat and the NGOs. The Secretariat sometimes assigns specific tasks to NGOs.[391] For instance, the International Fund for Animal Welfare (IFAW) assists with producing a list of species and products used in traditional medicine.[392] The effects of this close relationship are improvements in the information on regulated species trading, increased monitoring of compliance and increased implementation of the Convention's provisions.

As stated earlier, NGOs' participation in treaties is constantly criticized.[393] The criticisms are targeted at the NGOs' approach to States' compliance. For instance, they have been accused of using "selective approaches" such as "targeting 'weak' states or tackling only ‘politically acceptable issues’”.[394] Most NGOs’ involvement in treaty compliance is geared towards serving their purposes rather than the purpose of the treaty.[395] These criticisms notwithstanding, CITES and some other treaties may arguably not have achieved the level of compliance that is currently the case without the help of the NGOs.[396]

---

[389] See Rosalind Reeve, *supra* note 203 at 81 and 46.
[390] Rosalind Reeve, *supra* note 203 at 46.
[391] *Ibid.*
[392] *Ibid.*
[393] See part 2.4 of this paper.

The Convention also makes use of “carrots” (that is, incentives) in getting parties to comply with its provisions. One such incentive is the assistance given to the parties in the form of capacity building for the non-complying States. For instance, the parties in 1997 established MIKE (Monitoring the Illegal Killing of Elephants) to monitor the illegal trade in elephants and to build capacity in those States where the species exist.[397]

Overall, each of the three regimes examined above adopted one or more of the proposed theoretical approaches. The *Montreal Protocol* adopted the managerial approach; the *Kyoto Protocol* adopted both the managerial and the enforcement approach; and *CITES* adopted the managerial approach but with a special focus on NGO participation. Though the regimes examined seemed to favour one approach over the other, all of them adopted an enforcement measure in form of trade restriction or sanction. They also emphasized the importance of reporting, verification, and a non-compliance procedure to achieving parties' compliance. Having discussed the three model regimes, part 4 now deals with the Basel Convention compliance regime.

---

[394] Cesare Pitea, *supra* note 257 at 221.

[395] Jacobson & Weiss, “Assessing the Record”, in Jacobson & Weiss, *Engaging Countries, supra* note 9 at 534. The authors stated that some NGOs “have purposes that are anathema to enhanced compliance with environmental treaties”.

[396] Oran Young noted that the North American Great Lakes water quality regime was highly successful due to the work of NGOs. See Oran Young, *supra* note 8 at 94. Notable examples of other treaties in this regard include CITES, *supra* note 12; and the *Convention on Biological Diversity* and its associated protocols. See *Convention on Biological Diversity,* June 5, 1992, 1760 UNTS 79 effective December 29, 1993 online: Biological diversity website < http://www.biodiv.org/convention/articles.asp > and the *Cartagena Protocol on Biosafety to the Convention on Biological Diversity,* January 29, 2000 39 ILM 1027 (2000) effective September 11, 2003 online: Biodiversity website < http://www.biodiv.org/biosafety/protocol.asp >. The Friends of the Earth International’s (FOEI) publications on genetically modified crops and its effects and the exposition of corporations involved in such technology has helped to create public awareness on the issue and has also helped to stall corporations from engaging in such technology. See FOEI, “Mosanto who Benefits from GM Crops”, an FOEI publication, January 2006, Issue 110, online: FOEI website < http://www.foei.org/publications/pdfs/gmcrops2006full.pdf >.

[397] “Trade in Elephant Specimens”, COP Resolution 10.10 (Rev. COP12) June 1997, Harare, Zimbabwe, reinforced the establishment of MIKE (MIKE was earlier established under the supervision of the Standing Committee) and expanded its objectives. See online: CITES website < http://www.cites.org/eng/res/10/10-10.shtml >.

PART IV ACHIEVING COMPLIANCE WITH THE BASEL CONVENTION

Achieving compliance with treaty provisions is a continuing battle, which every treaty faces. Where there is substantial compliance, the issue then becomes how to ensure that parties continue to comply. Whether the issue is how to get parties to comply minimally with the treaty, or getting them to continue to comply after attaining the minimum level of compliance, compliance issues can either undermine or increase the effectiveness of any treaty.

Getting parties to comply with its provisions is a fundamental issue with the *Basel Convention.* The amount of illegal trade in hazardous wastes and the disposal of hazardous waste in an unsound manner show that some parties to the *Basel Convention* do not comply with the Convention. The COP adopted a managerial strategy and other strategies such as capacity building to deal with this issue. This part, therefore, examines the *Basel Convention*'s compliance regime with emphasis on the compliance strategies adopted by the regime, the deficits of applying the compliance strategies to date, and a recommendation based on the approaches adopted by the three regimes discussed above that could improve compliance in the Basel regime.

4.1 Basel Convention Compliance Mechanism

Parties to the *Basel Convention* are required to file annual reports containing information on: transboundary movement of hazardous wastes; accidents occurring during the transfrontier movement; measures taken to reduce or eliminate the production of hazardous wastes; bilateral, multilateral and regional agreements entered into by them; and the establishment of focal points[398] and competent authorities.[399] To make it easy for the parties to comply with this requirement, pre-filled questionnaires are circulated to the parties.[400] The Secretariat pre-fills the questionnaire with information filed by the party in its last annual report and the party confirms or amends the data provided or provides additional data if there are changes in the status presented. The data provided in the questionnaires are compiled in reports published by the *Convention*'s Secretariat.[401] The publication of the reports on the *Convention*'s website makes it easy for the parties, non-parties, individuals and corporations to identify those States that are not complying with the reporting requirements.

---

[398] Focal points refer to entities designated by a party for receiving and submitting information as provided in Articles 13 and 16. See *Basel Convention, supra* note 1, Art. 2(7).

[399] *Basel Convention, supra* note 1, Art.13(3). Competent Authorities are the governmental authorities designated by parties to receive notification of transboundary movement of hazardous wastes and other wastes and to respond to such notification in accordance with article 6. See *Basel Convention, supra* note 1, Art. 2(6).

[400] The use of pre-filled questionnaires as a means of reporting data was adopted by the Conference of the Parties by Decision VI/27 on December 2002 at its sixth meeting. See "Revised Questionnaire on Transmission of Information" online: Basel website < http://www.basel.int/natreporting/ >.

[401] The data submitted by parties are compiled in reports – titled "Compilation Part I and II" and "Country Facts Sheet"- published by the Secretariat. See online: Basel website < http://www.basel.int/nationalreporting/ >.

The Convention uses internal monitoring and verification of compliance. Monitoring and verification is imposed on the parties. Article 19 of the *Convention* requires parties "who have reason to believe" that a State is not complying with its obligations under the *Convention* to report the non-compliance to the Secretariat. While this provision ensures participation by parties in the compliance process, there is no guarantee that the parties will report the non-compliant party. Parties are usually reluctant to raise allegations of non-compliance against each other, as they may be at the receiving end of the ladder at another instance.[402]

In recognition of developing countries' difficulty in ensuring that their hazardous wastes are disposed of in an environmentally sound manner, the Conference of Parties (COP) in Decision VI/4 established the Basel Convention Regional Centres for Training and Technology Transfer (BCRC).[403] These regional centers were established to train representatives of the developing States on sound management of hazardous wastes using safe and sound technology, as well as transfer such technology to them. Currently, work is ongoing in developing its operational mechanisms, including funding.[404] The issue of funding for these regional centers is a great impediment to their successful operation.[405] The host countries - the developing countries where they are located - currently fund some of these regional centers with their total contributions, both financial and otherwise, ranging from US$8,500 to US$150,000 per year.[406]

---

[402] John Knox, *supra* note 230 at 1.

[403] See *The Establishment and Functioning of the Basel Convention Regional Centres for Training and Technology Transfer*, COP Decision VI/4, UNEP/CHW.6/4, 6th Session August 29, 2002.

[404] The COP in their 8th Conference held on November 26, 2006 at Nairobi, Kenya stressed the need for parties to develop a strategic plan for the working and operations of the Basel Convention Regional Centres. See *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal on its Eighth Meeting*, UNEP/CHW.8/16, 8th Session November 27 – December 1, 2006, Nairobi, online: Basel Convention website < http://www.basel.int/meetings/cop/cop8/docs/16e-uned.pdf >.

[405] *Ibid.*

To ensure further the parties' compliance with the Convention, the COP by decision COP VI/12 established the 'Mechanism for Promoting Implementation and Compliance: Terms of Reference' (the Mechanism) to assist parties in complying with their obligations and to facilitate, promote and monitor the parties' implementation and compliance with their obligations.[407] The Mechanism is "non-confrontational, flexible, non-binding, cost-effective, and preventive" in approach.[408] Just like the *Montreal Protocol*, it places an emphasis on the Chayeses' managerial approach to compliance; this approach to compliance is aimed at encouraging parties to comply through capacity building (financial and administrative), and incentives.[409] A Compliance Committee of 15 members nominated by the parties based on geographical representation of the United Nations' five regional groups administers the Mechanism.[410]

Just like the Facilitative Branch of the *Kyoto Protocol's* Implementation Committee, the Compliance Committee facilitates parties' compliance by hearing submissions on non-compliance by the affected party or by another concerned party or by submission from the Secretariat.[411] The aspects of non-compliance are discussed with the party concerned and recommendations are made to the COP for adoption. The Compliance Committee can also advise or make non-binding recommendations to a party on certain issues.[412] As part of its compliance-facilitative efforts, the Compliance Committee has, in its 2005/2006 action plan, drafted a questionnaire investigating the problems parties face in complying with their reporting obligations.[413] Unfortunately, many parties have not responded to the questionnaire.

---

[406] See "Basel Convention Regional Centres: Framework Agreements, Business Plans for the Period of 2007 –2008, and Operational Strengthening of the Centres" in *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal on its Eighth Meeting*, UNEP/CHW.8/INF/5, 8th Sess., November 27 – December 1, 2006, Nairobi, online: Basel Convention Website < http://www.basel.int/meetings/cop/cop8/docs/i05e.doc >, paras 83-85.

[407] See *Mechanism for Promoting Implementation and Compliance: Terms of Reference*, COP Decision VI/12 UNEP/CHW.6/40 online: Basel website <http://www.basel.int/legalmatters/compcommitte/termsref.doc> (hereinafter *The Mechanism*).

[408] *The Mechanism, supra* note 407 at para. 2.

[409] See part II of this paper.

[410] *The Mechanism, supra* note 407 at para.3.

Though the Compliance Committee has no enforcement powers, the *Basel Protocol* adopted by the parties provides for liability for damages resulting from transboundary movement of hazardous wastes.[414] Unfortunately, the *Basel Protocol* only provides for liability when actual damage results from non-compliance with the Convention. If there is no resulting damage from the act of non-compliance, liability will not attach. To the extent that liability arises when damage results from non-compliance, parties are encouraged to comply in order to avoid the liability. The existence of the *Basel Protocol* is not of much help yet, as it has not entered into force.[415]

In summary, while the Basel Convention compliance structure adopted some of the mechanisms of the *Montreal Protocol, Kyoto Protocol,* and *CITES* discussed above such as, a managerial approach in inducing compliance, incentives through capacity building, information reporting, monitoring, and verification; it did not take into consideration the issue of enforcement, bearing in mind that there are "hard liners" who will only comply if there are sanctions imposed. Also, it did not provide for information reporting, monitoring and verification from external sources. As stated earlier, parties would not normally report other parties for non-compliance. Therefore, reliance on only internal reporting, monitoring and verification by parties, reduces the amount and quality of information provided and makes it difficult for the Secretariat to know the actual number of violations going on. Furthermore, while the Basel Convention established regional centers for technology transfers, it did not provide the necessary operational support such as adequate funding, which is necessary for the optimal performance of the centres and which would assist developing countries in their technology acquisition.

---

[411] *The Mechanism, supra* note 407 at paras. 9-18.

[412] *The Mechanism, supra* note 407 at para. 19. The Compliance Committee can advise parties on establishing or strengthening its domestic legislations, obtaining financial and technical support, action plans to be adopted in implementing the Convention's provisions, and any follow up arrangements on progress reporting. Advise on any other issue than listed in paragraph 19, can only be made on agreement with the party.

[413] See online: Basel website < http://www.basel.int/legalmatters/compcommittee/wrkplan0506.htm >.

[414] See *Basel Protocol, supra* note 62.

[415] See the discussion in part I of this paper.

These deficits are tackled in the three regimes (*Montreal Protocol, Kyoto Protocol,* and *CITES*) discussed in part 3. The solutions proffered by these regimes form the basis of the model compliance strategy for Basel discussed in the next section.

4.2 Model Compliance Strategy

The amount of illegal trade in hazardous wastes and the disposal of hazardous wastes in an unsound manner[416] show a lack of a proper waste management strategy in both developed and developing States. A proper waste management strategy should be one that aims at: reducing the amount of hazardous wastes produced at the production level; providing alternative uses for the waste (reuse and recycling); and finally, establishing a disposal facility for the disposal of the hazardous wastes.[417]

---

[416] See the discussion in part I above.

Establishing a proper waste management strategy in the developed States is not too problematic due to the availability of advanced technology, manpower, and financial resources in those States. Establishing such strategy in the developing States is not so easy;[418] hence, the need for the establishment of training and technology transfer centers in those States. The Basel Convention Regional Centers are established for that purpose.

The mere existence of these centers is not sufficient. Financing is needed to embark on technology change or acquisition. The developing States would need funds to enable them acquire a new technology or to upgrade their existing systems. A possible solution would be the adoption of a funding mechanism similar to that in the *Montreal Protocol* with some minor modifications. As stated earlier, the *Montreal Protocol*'s multilateral fund was established to assist developing countries phase out their ODS production and use.[419] The criteria for eligibility, as is the case with the *Montreal Protocol*, may be based on per capita income.

The financial incentives may be given to the developing States in the form of grants and awards. Such financial incentives will not only help them to acquire a new technology or to upgrade an existing one, it would also reduce the craving for foreign exchange from trading in hazardous wastes and would lead to stronger efforts by means of legislation and monitoring to curb illegal trade in hazardous wastes. Changes in legislation and increase in monitoring would be possible if they are part of the conditions for funding. Continued compliance with the *Montreal Protocol* was a condition for funding under the Multilateral Fund.[420] While stronger legislation and increased monitoring efforts can serve to reduce the illegal trade, it does not completely eliminate waste trading in the black market and in other surrounding areas.[421] To eliminate the incidence of waste trading in the black market, the International Network for Environmental Compliance and Enforcement (INECE) has suggested that "harmonized regulation and enforcement activities throughout a region can prevent this phenomenon".[422] This can be achieved through the establishment of a network of contacts, exchange of information between enforcement agencies, and coordinated processing of cases.[423]

---

[417] See John Pichtel, *Waste Management Practices: Municipal, Hazardous, and Industrial,* (Boca Raton: Taylor & Francis, 2005) 15.

[418] See Jacobson & Weiss, "Assessing the Record" in Jacobson & Weiss, *supra* note 9 at 531. Jacobson & Weiss in their concluding chapter noted that changes in the Gross National Product, economic collapse and chaos, and inflation greatly affect the compliance rates of countries. The authors noted that limited governmental resources and inflation "had an impact on the incentive structure of the individuals who must enforce the provisions of CITES, the customs inspectors".

[419] See part 3.1 of this paper.

Bearing in mind that the establishment of a funding mechanism is not without its own problems (example, maintenance of the fund),[424] the procedure under the *Montreal Protocol* should be adopted only with some modifications. Contributions to the fund should not only be from the parties and international organizations like the GEF and the World Bank, but also from NGOs and corporations engaged in hazardous waste trade. NGO contribution would serve as a basis for the formal recognition of

---

[420] See generally, James Bove, *supra* note 210.

[421] INECE notes in this regard: "if enforcement in one port increases, illegal activities often moves to other ports in other countries". See Nancy Isarin, *supra* note 6.

[422] *Ibid.*

[423] *Ibid.* See also John Rothman, "Environmental Enforcement Across Borders: Is the US-Mexico Borders an Extreme Case?", an INECE newsletter, available online: INECE website < http://www.inece.org/newsletter/9/enforcement.html > or < http://inece.org/newsletter/9/rothman.pdf >.

[424] See James Bove, *supra* note 210 at 433-55 for a discussion of problems experienced with maintenance of the *Montreal Protocol's* Multilateral Fund.

NGO participation in the *Basel Convention*. Requiring corporations to contribute to the fund will induce responsible corporate behavior in the corporations.[425]

The contribution may be in form of tax or fees on the corporations. This will not only serve the purposes of the fund but also serve as a deterrent to corporations engaging in the hazardous waste trade. If the tax rate were relative to the amount of hazardous wastes generated by a corporation (i.e the higher the hazardous waste generated, the higher the tax), the net effect would be an effort to develop clean production techniques or to discover appropriate disposal channels within the State of the corporation.[426] As noted by Hirschhorn, waste tax would be effective if the tax rates are high enough to shift "critical waste management decisions".[427]

Applying this tax provision on corporations would be problematic as corporations are not subjects of international law.[428] To resolve this issue, exporting States should be mandated to impose high export duties on exports of hazardous wastes from their territories.[429] This was one of the suggestions made by the Basel Convention's Open-Ended Working Group (OEWG) on the satisfaction of the financial guarantee requirement of the *Basel Protocol*. The suggestion was drawn from the operation of the International Oil Pollution Compensation Fund.[430]

---

[425] Ricardo Bayon, *et al,* "Environmental Funds: Lessons Learned and Future Prospects", online: Strategy guide website < http://www.strategyguide.org/Pdfs/GEF/EnvironmentalFundslessonslearnedandfutureprospects.pdf > (accessed January 30, 2007).

[426] Joel S. Hirschhorn, "Hazardous Waste Source Reduction and A Waste-End Superfund Tax", a paper presented at the Massachusetts Hazardous Waste Source Reduction Conference of October 13, 1983, online: p2pays website < http://www.p2pays.org/ref/32/31773.pdf >, 3. See also Washington Department of Ecology, "Beyond Waste Issue Paper: Fee Systems", a report published by the Washington Department of Ecology (2003) online: Washington State Department of Ecology Website < http://www.ecy.wa.gov/pubs/0304046.pdf > or < http://www.ecy.wa.gov/biblio/0304046.html >.

[427] *Ibid.*

[428] See generally Martin Dixon, *Textbook on International Law,* 5th ed. (Oxford: Oxford University, 2005).

[429] For more explanation, see the discussion below on 'sanction'.

Apart from providing financial incentives and capacity building, some form of sanction is necessary to ensure parties' compliance.[431] As argued previously, the facilitative or managerial approach alone is not sufficient to make parties comply with the Convention in all cases.[432] One possible solution is for the parties to adopt the *Kyoto Protocol*'s approach with some modifications. The Basel Convention Compliance Committee should be empowered to impose sanctions on the defaulting party and there should be certainty as to the sanctions to be imposed in cases of violation. Smart sanctions (e.g targeted financial sanctions such as asset freezes, credit restrictions and transactions restrictions) should be used, as the violations in most cases are by the corporations in the State and not by the State itself. Providing a list of sanctions including smart sanctions grouped according to the severity of the non-compliance ensures certainty and removes all possibilities of bias and preferential treatment in the award of sanctions. To eliminate the possibility of bias arising (for instance, in respect of cases from regions represented by a committee member), the members of the Committee should act in their personal capacity and not as representatives of any State or region.[433] Just like the *Kyoto Protocol*, the decisions of the Compliance Committee should be binding, subject only to appeal to the COP on grounds of procedural irregularities. This will ensure the credibility and potency[434] of the Compliance Committee.

---

[430] *Implementation of the Decisions Adopted by the Conference of the Parties at its Seventh Meeting: Addendum Basel Protocol on Liability and Compensation: insurance, other financial guarantees and financial limits*, OEWG Decision, UNEP/CHW/OEWG/5/2/Add.7, 5th Session, March 2, 2006.

[431] See Jacobson & Weiss, "Assessing the Record" in Jacobson & Weiss, *Engaging Countries*, *supra* note 9 at 527-28.

[432] See the discussion in part II of this paper.

[433] See Catherine Hagem & Hege Westskog, *supra* note 371 at 107-108.

Furthermore, there should be sanctions imposed on the parties for failing to submit their annual reports, as is the case with CITES,[435] or for disposing of their wastes in an unsound manner. The existing managerial strategy in the Basel Compliance mechanism have not had much effect in inducing a behavioural change in the parties; hence, the nonchalant attitude of *Basel Convention* parties towards their treaty obligations. Imposing sanctions including smart sanctions, trade sanctions as used in CITES,[436] and other sanctions like withdrawal of diplomatic offices, and fines may induce a change in States' behaviour thereby increasing compliance. Trade sanctions may conflict with the GATT/WTO Rules, which aim at removing all barriers to trade between member nations; however, as argued previously, it should be allowed on grounds that the measure is necessary to protect the environment.[437]

It may be argued that imposing sanctions on the defaulting State party does not ensure that the violation would not continue, as the violation is often by a corporation with insurance. If this is so, the issue then becomes: what is the treaty aiming to achieve by imposing sanctions on the State since the violation is not by the State? The answer to the question shall proceed on the premise that only States are the subjects of treaties and that it is difficult for treaties such as the *Basel Convention* to enforce its provisions directly on private corporations.[438] Based on this premise, sanctions imposed on States - whether they are in the form of a duty to implement legislation on the corporations or in form of financial sanctions - would have an indirect effect on corporations operating in the State. When sanctions such as fines are imposed on a State, the fines could be extracted from the corporations in form of taxes and duties. Incorporating sanctions as a compliance inducement tool in the Convention has a chain effect of inducing the States to require their corporations to achieve compliance with the Convention.

---

[434] Ronald Mitchell, *supra* note 180. See also section 2.3A of this paper.
[435] See section 3.2 above.
[436] Use of trade sanctions may be frowned upon in view of the WTO rules aimed at eliminating all barriers to trade. See the 1994 *General Agreement on Tariffs and Trade* (GATT), *supra* note 49. GATT has been incorporated as part of the WTO rules.
[437] See the discussion on 3.2 above.

The Basel Convention relies solely on the parties and the Secretariat (internal measures) for monitoring and verifying compliance.[439] Reliance on parties and the Secretariat alone is not sufficient to ensure compliance. Parties, usually, would not report other non-compliant parties and the Secretariat could act only on information submitted to it by the parties. It is, therefore, important to have an external means of monitoring and verifying parties' compliance. The measures adopted in *CITES* and the *Kyoto Protocol* provide a model. CITES uses NGOs as an external source of information, compliance monitoring and verification. The *Kyoto Protocol*, on the other hand, uses expert review teams to verify information submitted by parties.[440] Either alternative would be an improvement.

NGOs should be incorporated into the *Basel Convention*'s compliance mechanism. They should be allowed to submit independent reports on parties' compliance to the Secretariat. The reports submitted by them should be used to verify the accuracy of the information submitted by the parties. To reduce proliferation of NGOs, which ultimately affects the quality and authenticity of information submitted,[441] the *Basel Convention* should, like *CITES*, limit participation to a few NGOs with strong credibility and expertise in the field of hazardous wastes. Eligibility should be based on expertise, resources, and method of approach.[442] The Secretariat should establish minimal standards of accountability, as argued previously, to monitor their performance. These proposals do not suggest that NGOs should be conferred a formal legal status under the Convention. Instead, their status should still remain informal while they are held accountable under standards established by the Secretariat.

---

[438] For a discussion of this public international law principle, see generally Martin Dixon, *supra* note 428.

[439] See *Basel Convention, supra* note 1, Art. 19. See also the discussion on section 4.1.

[440] *Kyoto Protocol, supra* note 12, Art. 8.

As an alternative to NGOs or in addition to NGO participation, the Convention could adopt the *Kyoto Protocol's* expert review team system. The expert review teams, made up of experts on hazardous wastes, could provide monitoring and verification as an alternative to using NGOs. This suggestion is based on the idea that the Basel Convention parties may strongly oppose NGO participation. The expert review teams could also be used in addition to NGOs. While the NGOs perform the functions of monitoring and verification, the teams could be assigned to specific tasks such as inspection of States' disposal facilities with power to issue certificates (such as personnel certification, certification of technology, and training) if the disposal facility or the disposal process is found to be environmentally sound.[443] This will reduce the level of illegal waste disposal and build a consciousness in States to ensure that they have adequate disposal facility before importing any waste for disposal. The success of the work of expert review teams depends a lot on the availability of funding. It is, therefore, necessary that a hazardous waste fund be set up as advocated earlier.

---

[441] See the discussion in part 2.4 above.

[442] For instance, CITES criteria for NGO involvement is expertise in the subject areas covered by CITES. CITES Secretariat is currently being persuaded to confer more participatory rights to the Species Survival Network (SSN), an NGO offering "legal, scientific and animal welfare". See Rosalind Reeve, *supra* note 203 at 46.

Conclusion

Considering that the Basel Convention has been in effect for fifteen years now, one would expect that the level of compliance with it would be high, but this is not the case. This thesis establishes that parties' compliance with the Convention is still problematic; hence, the need for better strategies to improve and sustain compliance. Improving compliance with the Basel Convention is very important considering the hazardous effects of illegal waste trade and illegal disposal of hazardous wastes, which affect not only the lives and properties of persons in the affected State but the environment of other States as well.

This paper adopted a dual approach (the managerial and the enforcement approaches) to improving compliance. This approach was adopted because it has been shown that the managerial approach adopted under the Basel Convention has not been completely effective in improving and sustaining compliance. The dual approach, which provides for enforcement in form of sanctions and facilitates compliance through capacity building and incentives, would work better than the managerial approach alone. It would benefit those States that cannot comply with the Convention provisions on the basis of technical incapacity as well as compel those States with no intention of complying, into compliance.

---

[443] The expert review teams under the *Kyoto Protocol* were given specific tasks. They were mandated to undertake thorough and comprehensive technical assessments of all aspects of parties' implementation of the Protocol, to identify problems with such implementation and to advise the parties on methods of improving compliance. Adopting such a system in the *Basel Convention* would greatly improve compliance. See "Guidelines for Review under Article 8 of the Kyoto Protocol", COP Decision 22/CMP.1 in *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its First Session, Held at Montreal From November 28 to December 10, 2005,* March 30, 2006 FCCC/KP/CMP/2005/8/Add.3.

Adopting this dual approach in the Basel Convention would involve the incorporation of certain elements into the Convention. Some of the elements (as discussed in part 4.2) include: establishing a fund to be contributed to by parties and corporations engaged in the hazardous waste trade to assist parties in adopting new technology that complies with the *Basel Convention's* objectives; empowering the Compliance Committee to impose sanctions including smart sanctions on the defaulting parties and their corporations and giving a binding effect to the decisions of the Compliance Committee; and allowing both internal and external monitoring of parties' compliance. Incorporating these elements into the *Basel Convention's* compliance mechanism will increase the parties' compliance with the Convention, as well as increase the overall effectiveness of the *Convention.*[444]

This paper recognizes that parties' acceptance of the model strategy advocated above is not certain. Parties may refuse to accept the model strategy for a number of reasons: self-interest, economic changes, and sovereignty.[445] Individual interests of parties determine the direction of States' preferences in treaty negotiation.[446] Parties are more concerned with adopting a provision that would cater to their interests than one that would not. This explains why the Basel Convention parties have yet to adopt the Basel Ban Amendment canvassed by the African States. A complete ban of hazardous waste trade from OECD to non-OECD States does not favour OECD States that are the major producers of hazardous wastes.[447]

---

[444] There are other measures such as citizens' suit or enforcement measures which were not discussed in this paper but which may improve compliance with the Convention. Such measures may form the subject of further research.

[445] See Peter M. Haas & Jan Sundgren, "Evolving International Environmental Law: Changing Practices of National Sovereignty", in Nazli Choucri, ed., *Global Accord Environmental Challenges*

Adopting a new technology, contributing to a fund, and engaging in technology transfer involve changes to a State's economy. Some States may be unwilling to embark on such changes due to their economic situation or their foreign policy[448] and this may affect their willingness to accept the model strategy advocated above. Also, States are wary of issues that challenge their sovereignty.[449] Such issues include empowering the Basel Compliance Committee to issue sanctions in cases of non-compliance as advocated above.

In view of the limitations identified above, and the possibility that the adoption of some or all of the elements discussed above may entail an amendment to either the Convention or the Basel Convention Mechanism, negotiating the adoption of the model strategy may be a cumbersome and lengthy process. For instance, it took nearly

---

and International Reponses, (Cambridge, Massachusetts: MIT, 1993), 401 (hereinafter Nazli Choucri, *Global Accord*); Oran R. Young, "Negotiating an International Climate Regime: The Institutional Bargaining for Environmental Governance", (hereinafter "Negotiating International Climate Regime") in Nazli Choucri, *Global Accord,* 431; and David G. Victor, Abram Chayes, & Eugene Skolnikoff, "Pragmatic Approaches to Regime Building for Complex International Problems" in Nazli Choueri, *Global Accord,* 453.

[446] Oran Young, "Negotiating International Climate Regime", *supra* note 445 at 440. See also the discussion in part 2.1 (C) above.

[447] See the discussion in part 1 above.

[448] See generally Abram Chayes & Antonia Chayes, *The New Sovereignty, supra* note 146; Harold Jacobson & Edith Brown Weiss, "Assessing the Record", in Jacobson & Weiss, eds., *Engaging Countries, supra* note 9.

[449] Peter M. Haas & Jan Sundgren, *supra* note 445 at 402 –3.

three years for the parties to conclude the Kyoto Protocol. Also, it took not less than eighteen months to negotiate and conclude the Basel Convention and it took an additional period of three years for parties to adopt it.

Notwithstanding the above stated obstacles, parties' adoption of the model strategy is possible. Two possible options could ensure this. The first option involves building the organizational capacity in the Basel Secretariat to ensure the effective operation of the model strategy.[450] For instance, allowing external monitoring, information reporting and verification would require some organizational and technical adjustments in the Secretariat. If this is done and parties see that the Secretariat could execute this model strategy they would be encouraged to adopt it. The organizational restructuring can be done while parties are discussing the model strategy. This is currently the position under the Kyoto Protocol wherein the Secretariat is trying to put in motion all that would ensure the effective operation of the Flexibility Mechanisms.

The other option would be to focus on negotiation. Series of informal meetings could be held with the parties comprising a mixture of the developing and developed States. The aim of the meetings would be to inform and educate the parties on the need to adopt the model strategy by presenting strong arguments that would ensure a positive shift in their attitudes (self-interests, economic positions, and sovereignty) towards the model strategy.[451] This could result in the adoption of the model strategy by some States. These States can adopt a leading stance that others can follow.[452] This strategy was adopted in the negotiation of the Basel Convention and it proved effective in getting parties to sign the Convention. It would also be effective in the negotiation and subsequent adoption of the model strategy.

---

[450] See David Victor, Abram Chayes, & Eugene Skolnikoff, *supra* note 445 at 471-72.
[451] See the discussion in part 2.1 especially fn. 170.
[452] See fn. 224 *supra*.

BIBLIOGRAPHY

Binding Instruments (Treaties)

Agreement between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste October 28, 1986 online: Environment Canada website < http://www.ec.gc.ca/tmb/eng/tmbcanusatxt_e.html >.

Agreement of Co-operation Between the United States of America and the United Mexican States Regarding the Transboundary Shipments of Hazardous Wastes and Hazardous Substances November 12, 1986.

Agreement Establishing the World Trade Organization 1867 UNTS 154 online: WTO website < http://www.wto.org/english/docs_e/legal_e/04-wto.pdf >.

Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes Within Africa January 30, 1991 effective April 22, 1998 online: African Union website < http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/offTreaties_Conventions_&_Protocols.htm >.

Basel Convention on Transboundary Movement of Hazardous Wastes and their Disposal, March 22, 1989 1673 UNTS 126, effective May 5, 1992, online: Basel Convention website < http://www.basel.int/text/text.html >.

Charter of the United Nations, June 26, 1945, 59 Stat. 1031, TS 993 effective October 24, 1945 online: United Nations website < http://www.un.org/aboutun/charter/ >.

Cartagena Protocol on Biosafety January 29, 2000, 39 ILM 1027 (2000) effective September 11, 2003 online: Biodiversity website < http://www.biodiv.org/biosafety/protocol.asp >.

Convention on Biological Diversity June 5, 1992, 1760 UNTS 79 effective December 29, 1993 online: Biological diversity website < http://www.biodiv.org/convention/articles.asp >.

Convention on International Trade in Endangered Species of Wild Fauna and Flora March 3, 1973 993 UNTS 243 effective August 1, 1975 online: CITES website < http://www.cites.org/eng/disc/text.shtml >.

Convention on Nuclear Safety June 17, 1994 1963 UNTS 293, effective October 24, 1996 online: IAEA website < http://www.iaea.org/Publications/Documents/Conventions/nukesafety.html >.

Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, December 29 1972 11 ILM 1294 (1972) effective 30/8/1975.

Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade September 10, 1998 38 ILM 1 (1999) effective February 24, 2004 online: the PIC website < http://www.pic.int/en/ViewPage.asp?id=104 >.

General Agreement on Trade and Tariffs (GATT), January 1,1948 55 UNTS 194 online: WTO website < http://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf >.

General Agreement on Trade and Tariffs (GATT) (1994) 1867 UNTS 187 online: WTO Website < http://www.wto.org/english/docs_e/legal_e/06-gatt.pdf >.

International Convention for the Safety of Life at Sea, November 1, 1974, 1184 UNTS 278, entered into force May 25, 1980, (has been amended at various times) Annex VII online: Australasian Legal Information Institute (AustLII) < http://www.austlii.edu.au/au/other/dfat/treaties/1983/22.html >.

Joint Convention on the Safety of Spent Fuel and Radioactive Waste Management 36 ILM (1997) 1436, effective June 18, 2001.

Kyoto Protocol to the United Nations Framework Convention on Climate Change December 11,1997 37 ILM 22 (1998) not yet in force, online: UNFCC website < http://www.unfcc.int/essential_background/kyoto_Protocol/background/items/1351.php >.

Montreal Protocol on Substances that Deplete the Ozone Layer September 16, 1987 26 ILM 1550 (1987) effective January 1, 1989 online: UNEP website < http://www.unep.ch/ozone/montreal.shtml >.

North-America Free Trade Agreement December 17, 1992, 32 ILM 289, 605 (1993), effective 1/1/1994 online: NAFTA Secretariat website < http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78 >.

Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and Their Disposal, December 10, 1999 UN Doc.UNEP/CHW.1/WG/1/9/2 online: Basel Convention website < http://www.basel.int/pub/protocol.html >.

United Nations Framework Convention on Climate Change, May 9, 1992, 1771 UNTS 107, Effective March 21, 1994 online: UNFCCC website < http://unfccc.int/essential_background/convention/items/2627.php >.

Soft law instruments (Resolutions, Decisions and Declarations)

Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes UN. Doc. UNEP/WG.122/3 (1985), approved, UN. Doc. UNEP/GC.14/17 (1987).

Code of Practice on the International Transboundary Movement of Radioactive Waste, I.A.E.A.Doc. GC(34)/Res/53 (September 21, 1990).

Decision Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention 22 September 1995 UNEP/CHW.3/35 online: Basel Convention website < http://www.basel.int/meetings/cop/cop1-4/cop3decisions_e.pdf >.

Declaration of the United Nations Conference on the Human Environment June 16, 1972 11 ILM 1416 (1972) online: UNEP website <http://www.unep.org/Documents/Default.asp?DocumentID=97&ArticleID=1503>.

The Establishment and Functioning of the Basel Convention Regional Centres for Training and Technology Transfer, COP Decision VI/4, UNEP/CHW.6/4, 6th Session August 29, 2002.

Guidelines for the Implementation of Article 6 of the Kyoto Protocol, Decision 16/CP.7, in Report of the Conference of the Parties on its Seventh Session held at Marrakesh from October 29 to Nov. 10, 2001, FCCC/CP/2001/13/Add.2 (January 21, 2002), 5.

Guidelines for the Implementation of Article 6 of the Kyoto Protocol, COP Decision 16/CP.7 FCCC/CP/2001/13/Add.2, Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October -10 November, 2001, 5 online: UNFCCC website < http://unfccc.int/resource/docs/cop7/13a02.pdf#page=5 >.

Implementation of the Decisions Adopted by the Conference of the Parties at its Seventh Meeting: Addendum Basel Protocol on Liability and Compensation: insurance, other financial guarantees and financial limits, OEWG Decision, UNEP/CHW/OEWG/5/2/Add.7, 5th Session, March 2, 2006.

Mechanism for Promoting Implementation and Compliance: Terms of Reference, COP Decision VI/12 UNEP/CHW.6/40 online: Basel website <http://www.basel.int/legalmatters/compcommitte/termsref.doc>.

Modalities for accounting of assigned amounts under Article 7, paragraph 4 of the Kyoto Protocol, COP Decision 19/CP.7, FCCC/CP/2001/13/Add.2, Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October -10 November, 2001, 55.

Permits and Certificates, Conference of the Parties resolution, Conf.12.3 (Rev. COP13), Twelfth Meeting of the COP, Santiago Chile, Nov. 3-15, 2002, online: CITES website < http://www.cites.org/eng/res/12/12-03R13 >.

Principles, nature and Scope of the Mechanism pursuant to Articles 6, 12 and 17 of the Kyoto Protocol COP Decision 15/CP.7, Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October -10 November, 2001, 2.

Procedures and Mechanisms relating to Compliance under the Kyoto Protocol, Decision 24/CP.7 FCCC/CP/2001/13/Add.3, Report of the Conference of the Parties on its Seventh Session, held at Marrakesh from October 29 to November 10, 2001, online: UNFCCC website <http://fccc.int/resource/docs/cop7/13ao3.pdf#page=64 >.

Rio Declaration on Environment and Development, June 13, 1992 UN Doc.A/CONF.151/26 (Vol.1) online: UNEP website <http://www.unep.org/Documents/Default.asp?DocumentID=78&ArticleID=1163>.

UNEP Governing Council Decisions UNEP/GC.9/19A, 9th Session May 26, 1981 recalling Decision 8/15 of the previous year (UNEP/GC.8/15).

UNEP Governing Council Decision Appointing Experts to Develop Guidelines on Environmentally Sound Disposal of Hazardous Wastes UNEP, Governing Council Decision 10/24 of May 31, 1982.

UNEP Governing Council Decision Mandating the Executive Director to Set Up a Working Group to Draft the Basel Convention UN. Doc. UNEP/WG.122/3 (1985), approved, UN. Doc. UNEP/GC.14/17 (1987).

Legislation

The United States Code, 43 U.S.C § 1349 (29) 2006.

The United States Code, 33 U.S.C § 1365 (26) 2005.

Jurisprudence

United States v. Canada (Trail Smelter Arbitration) 3 RIAA 1907 (1941).

United States-Import Prohibition of Certain Shrimp and Shrimp Products, WTO Appellate Body Report Feb. 27,1997, AB Report, WT/DS58/AB/R.

Secondary Materials: Monographs

Andersen Stephen & Sarma K. Madhava. *Protecting the Ozone Layer: The United Nations History* (London: Earthscan, 2002).

Axelrod O. Robert. *The Evolution of Cooperation* (New York: Basic Books, 1984).

Birnie Patricia & Boyle Alan. *International Law and the Environment* 2nd ed. (Oxford: Oxford University Press, 2002).

Brozska Michael. ed., *Design and Implementation of Arms Embargoes and Travel and Aviation Related Sanctions – Results of the 'Bonn – Berlin Process'* (Bonn: Bonn International Centre for Conversion (BICC), 2001), online: BICC website < http://www.bicc.de/events/unsanc/2000/pdf/booklet/chapter_7.pdf >.

Butler William. ed. *Control Over Compliance with International Law* (Dordrecht: Martinus Nijhoff, 1991).

Chambers Bradnee W. ed. *Inter-linkages: The Kyoto Protocol and the International Trade and Investment Regimes* (Tokyo: The United Nations University Press, 2001).

Chayes Abram & Chayes Antonia. *The New Sovereignty: Compliance With International Regulatory Agreements* (USA: Harvard University Press, 1995).

Choucri Nazli. ed., *Global Accord Environmental Challenges and International Reponses,* (Cambridge, Massachusetts: MIT, 1993).

Cortright David, Lopez A. George, & Gerber Linda. *Sanctions and the Search for Security* (Boulder: Lynne Rienner, 2002).

Dixon Martin. *Textbook on International Law,* 5th ed. (Oxford: Oxford University, 2005).

Doelle Meinhard. *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Canada: Thomson Canada Ltd., 2005).

Editors of the Harvard Law Review, *Trends in International Environmental Law* (USA: American Bar Association, 1992).

Franck M. Thomas. *The Power of Legitimacy Among Nations* (New York: Oxford Univ., 1990).

Keohane Robert. *After Hegemony: Cooperation and Discord in the World Political Economy,* (Princeton, New Jersey: Princeton Univ., 1984).

Kiss A. & Shelton D. *International Environmental Law,* 3rd ed., (New York: Transnational Inc., 2004).

Kummer Katharina. *International Management of Hazardous Wastes: The Basel Convention and Related Legal Rules* (Oxford: Oxford University Press, 1995).

Kwiatkowska Barbara & Soons H.A. Alfred. *Transboundary Movements and Disposal of Hazardous Wastes in International Law: Basic Instruments* (Dordrecht, Boston: Martinus Nijhoff/Graham and Trotman, 1993).

Lee Henry (ed). *Shaping National Responses to Climate Change: A Post-Rio Guide* (Washington D.C: Island Press, 1995).

Mitchell Ronald. *International Oil Pollution at Sea: Environmental Policy and Treaty Compliance,* (Cambridge: MIT Press, 1994).

OECD. *Trade Measures in Multilateral Environmental Agreements: A Synthesis Report of Three Case Studies,* OECD Working Papers Vol. VII No. 12, (Paris: OECD, 1999).

Pevato Paula M. ed., *International Environmental Law Volume 1* (England/USA: Dartmouth & Ashgate, 2003).

Pichtel John. *Waste Management Practices: Municipal, Hazardous, and Industrial,* (Boca Raton: Taylor & Francis, 2005).

Posey A. Darrell & Dutfield Graham. *Beyond Intellectual Property: Toward Traditional Resource Rights for Indigenous Peoples and Local Communities,* (Canada: IDRC, 1996).

Reeve Rosalind. *Policing International Trade in Endangered Species: The CITES Treaty and Compliance* (London: Royal Institute of International Affairs & Earthscan Ltd., 2002).

Sands Philippe. *Principles of International Environmental Law,* 2nd ed. (United Kingdom: Cambridge University Press, 2003).

Stokke Olav Schram, Hovi Jon & Ulfstein Geir. eds. *Implementing the Climate Regime: International Compliance* (London: Earthscan, 2005).

Treves Tullio *et al.* eds., *Civil Society, International Courts and Compliance Bodies* (The Hague: T.M.C Asser, 2005).

Victor David, Raustiala K., and Skolnikoff E. eds. *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge and Austria: The MIT Press & International Institute for Applied Systems Analysis, 1998).

Victor David, Chayes Abram, & Skolnikoff Eugene. "Pragmatic Approaches to Regime Building for Complex International Problems" in Nazli Choucri, *Global Accord,* 453.

Victor David. *The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure* (Austria: International Institute for Applied Systems Analysis, 1996).

Weiss B. Edith & Jacobson K. Harold eds. *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: The MIT Press, 1998).

Yoshida O. *The International Legal Regime for the Protection of the Stratospheric Ozone Layer: International Law, International Regimes and Sustainable Development,* (The Netherlands: Kluwer Law International, 2001).

Young Oran. *Governance in World Affairs* (USA: Cornell University, 1999).

Secondary Materials: Articles

Alvarez E. Jose. "Why Nations Behave" (1997/98) 19 Mich. J. Int'l L. 303.

Andresen Steiner. "The Making and Implementation of Whaling Policies: Does Participation Make A Difference?" in Victor D., Raustiala K., and Skolnikoff E. eds. *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (Cambridge and Austria: The MIT & International Institute for Applied Systems Analysis, 1998).

Andresen Steiner & Gulbrandsen Lars H. "The Role of Green NGOs in Promoting Climate Compliance", in Stokke Olav Schram, Hovi Jon & Ulfstein Geir. eds. *Implementing the Climate Regime: International Compliance* (London: Earthscan, 2005) 169.

Aubert Vilhelm. "On Methods of Legal Influence" in Burman S. & Harrel-Bond B. *The Imposition of Law* (New York: Academic, 1979) 30.

Bankobeza Gilbert. "Strengthening the Implementation of Multilateral Environmental Agreements", a paper presented at the Seventh International Conference on Environment and Compliance 9-15 April, 2005, 253 online: INECE website < http://www.inece.org/conference/7/vol1/Bankobeza.pdf#search=%22Incentives%20in%20Montreal%20Protocol%22 >.

Benvenisti Eyal. "Exit and Voice in the Age of Globalization" (1999) 98 Mich. L. Rev. 167.

Blaikie Piers & Simo John Mope. "Cameroun's Environmental Accords: Signed, Sealed, but Undelivered" in Jacobson Harold & Weiss Edith Brown. eds. *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: The MIT, 1998).

Bombay Peter. "The Role of Environmental NGOs in International Environmental Conferences and Agreements: Some Important Features", (2001) Eur. Envt'l L. R. 228.

Bove James Andrew. "A Study of the Financial Mechanism of the Montreal Protocol on Substances That Deplete the Ozone Layer", (2002/3) 9 Envt'l L 399.

Boyer Barry & Meidinger Errol. "Privatizing Regulatory Enforcement" (1985) 34 Buffalo L. Rev. 833.

Brack Duncan. "Monitoring the Montreal Protocol" in Findlay Trevor. ed., *Verification Yearbook 2003* (London: VERTIC, 2003) 209, online: VERTIC website < http://www.vertic.org/assets/YB03/VY03_Brack.pdf >.

Brunnee Jutta. "The Kyoto Protocol: Testing Ground for Compliance Theories", (2003) 63:2 Heidelberg J. Int'l L. 255.

___________. "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol", (2000) 13:2 Tulane Envt'l L.J. 223.

Brzoska Michael. "From Dumb to Smart? Recent Reforms of UN Sanctions", (2003) 9 Global Governance 519.

Chayes Abram, Chayes Antonia & Mitchell Ronald B. " Managing Compliance: A Comparative Perspective", in Jacobson Harold & Weiss Edith Brown, eds. *Engaging Countries: Strengthening Compliance with International Environmental Accords* (Cambridge: The MIT, 1998).

Collier David & Mahoney James. "Insights and Pitfalls: Selection Bias in Qualitative Research", (1996) 49 World Politics 56.

Dai Xinyuan. "Information Systems in Treaty Regimes", (2002) 54 World Politics 405.

Dodson Roy .D. "Citizens' Enforcement of the Clean Water Act", online: EPA website < http://www.epa.gov/region6/6en/w/cwa505.htm >.

Downs W. George. "Enforcement and the Evolution of Co-operation", (1997/98) 19 Mich. J. Int'l L. 319.

Downs W. George, Rocke M. David & Barsoom Peter. "Is the Good News About Compliance Good News About Cooperation" in Martin L. Lisa & Simmons A. Beth. eds., *International Institutions: An International Organization Reader,* (Cambridge: MIT Press, 2001).

Drezner W. Daniel. "How Smart are Smart Sanctions", (2003) 5 Int'l Stud. Rev. 107.

Franck Thomas. "Legitimacy in the International System", (1988) 82 Amer. J. Int'l L. 705.

Garbosky P.N. "Regulation by Reward: On the Use of Incentives as Regulatory Instruments", (1995) 17 Law & Policy 257.

Gillespie Alexander. "Implementation and Compliance Concerns in International Environmental Law: The State of the Art within Three International Regimes" (2003) 7 N.Z. J. Envt'l. L. 53.

Goldberg Donald L. *et al.* "Effectiveness of Trade and Positive Measures in Multilateral Environmental Agreements: Lessons from the Montreal Protocol", a CIEL paper prepared for UNEP, online: CIEL Website < http://www.ciel.org/Publications/EffectivenessofTradeandPosMeasures.pdf > 29.

Goldman Patti. "Resolving the Trade and Environment Debate: In Search of A Neutral Forum and Neutral Principles" (1992) 49 Wash. & Lee L. Rev. 1279.

Greve Michael S. "The Private Enforcement of Environmental Law", (1990) 65 Tul. L. Rev. 339.

Gudofsky Jason. "Transboundary Shipments of Hazardous Waste for Recycling and Recovery Operations" (1998) 34 Stan. J. Int'l. L. 219.

Haas M. Peter & Sundgren Jan. "Evolving International Environmental Law: Changing Practices of National Sovereignty", in Nazli Choucri, ed., *Global Accord Environmental Challenges and International Reponses,* (Cambridge, Massachusetts: MIT, 1993), 401.

Hackett David. "An Assessment of the Basel Convention on the Control of Transboundary Movement of Hazardous wastes and their Disposal", (1989-90) 5 AM.U.J. Int'l L. & Pol'y 291.

Hagem Catherine & Westskog Hege. "Effective Enforcement and Double-Edged Deterrents: How the Impact of Sanctions Also Affect Complying Parties", in Olav Stokke, Jon Hovi, & Geir Ulfstein, eds. *Implementing the Climate Regime: International Compliance,* (London: Earthscan, 2005) 107.

Hajost Scott & Quinlan J. Shea III. "An Overview of Enforcement and Compliance Mechanisms in International Environmental Agreements", a paper delivered at the International Network for Environmental Compliance and Enforcement, 1st International Enforcement Workshop, Utrecht, The Netherlands, May 1990 online: INECE website < http://www.inece.org/1stvol1/hajost.htm >.

Heinen Joel & Chapagain D. "On the Expansion of Species Protection in Nepal: Advances and Pitfalls of New Efforts to Comply with CITES" (2002) 5 J. Int'l Wildlife L. & P. 235.

Helfer R. Laurence & Slaughter A.M. "Toward a Theory of Effective Supranational Adjudication, (1997) 107 Yale L. J. 273.

Hirschhorn S. Joel. "Hazardous Waste Source Reduction and A Waste-End Superfund Tax", a paper presented at the Massachusetts Hazardous Waste Source

Reduction Conference of October 13, 1983, online: p2pays website < http://www.p2pays.org/ref/32/31773.pdf >,

Hovi Jon. "The Pros and Cons of External Enforcement" in Stokke Olav *et al, Implementing Climate Change,* 129.

Howard Kathleen. "The Basel Convention: Control of Transboundary Movements of Hazardous Wastes and Their Disposal" (1990) 14 Hastings Int'l & Comp. L. Rev. 223.

Kelly Claire. "Realist Theory and Real Constraints", (2003/4) 44 Va. J. Int'l L. 545.

Kingsbury Benedict. "The Concept of Compliance As A Function of Competing Conceptions of International Law" (1997-98) 19 Mich. J. Int'l L. 345.

Knox John. "Citizen Suits in International Environmental Law: The North American Experience", 1 online: INECE website <http://www.inece.org/conf/proceedings2/42-KNOX%20NewALT.pdf >. This is an excerpt from his paper titled " A New Approach to Compliance with International Environmental Law: The Submissions Procedure of the NAFTA Environmental Commission" (2001) 28:1 Ecology L.Q. 1.

Kupchan Charles & Kupchan Clifford. "Concerts, Collective Security and the Future of Europe", (1991) 16 Int'l Security 114.

Kruger Joseph. "Companies and Regulators in Emissions Trading Programs", a discussion paper available online < http://www.inece.org/news.html > or http://www.rff.org/rff/Documents/RFF-DP-05-03.pdf >.

Krueger Jonathan. "The Basel Convention and the International Trade in Hazardous Wastes" [2001/2] Yearbook of International Co-operation on Envt'l and Devt'l (London: Earthscan Publicatons, 2001/2002) 43

Loibl Gerhard. "Reporting and Information Systems in International Environmental Agreements As A Means for Dispute Prevention – The Role of "International Institutions" in *Non-State Actors and International Law* 5:1 (The Netherlands: Brill Academic Publishers, 2005) 1.

Martens Kerstin. "Examining the (Non) Status of NGOs in International Law", (2003) 10 Ind. J. Global Legal Stud. 1.

McCormick John. "The Role of Environmental NGOs in International Regimes" in Axelrod R.S, Downie D. & Vig N. eds. *The Global Environment: Institutions, Law, and Policy,* (Washington D.C: C.Q Press, 2005) 83 (hereinafter Axelrod et al, *Global Environment*).

Mitchell Ronald. “Flexibility, Compliance and Norm Development in the Climate Regime” in Olav Stokke *et al, Implementing Climate Change,* 65.

Moravcsik Andrew. “Taking Preferences Seriously: A Liberal Theory of International Politics”, (1997) 51 Int’l Org. 513.

Nhien Q. Vu Hao. “The Law of Treaties and the Export of Hazardous Waste”, (1994) 12 UCLA J. Envt’l. L. & Pol’y 389.

Orellana A. Marcos. “Shipbreaking and *Le Clemenceau* Row”, (2006) 10:4 ASIL Insight, 1 online: ASIL Website < http://www.asil.org/insights/2006/02/insights060224.html >.

Ott E. Hermann. “Climate Policy After Marrakesh Accords: From Legislation to Implementation” online: Wuppertal Institute website < http://www.wupperinst.org/download/Ott-after-marrakesh.pdf >.

Pitea Cesare. “NGOs in Non-Compliance Mechanisms under Multilateral Environmental Agreements: From Tolerance to Recognition”, in Tullio Treves *et al.* ed., *Civil Society, International Courts and Compliance Bodies* (The Netherlands: T.M.C Asser, 2005) 205.

Raustiala Kal. “Compliance & Effectiveness in International Regulatory Cooperation” (2000) 32 Case W. Res. J. Int’l L. 387.

Raustiala Kal & Slaughter A. M. “International Law, International Relations and Compliance” in Simmons Beth A. Walter Carlsnaes, & Thomas Reese, *Handbook of International Relations* (London: SAGE Inc., 2002) 559.

Rebasti Emanuele & Vierucci Luisa. “A Legal Status for NGOs in Contemporary International Law?”, online: ESIL website < http://www.esil-sedi.eu/english/pdf/VierucciRebasti.PDF >.

Roberts E. & Dobbins J. “The Role of the Citizen in Environmental Enforcement”, a paper delivered at the 5th International Conference on Environmental Compliance and Enforcement in Monterey, USA November 16-20, 1998.

Rummel-Bulska Iwona. “Transboundary Movement of Hazardous Waste”, (1994) 4 Y. Int’l Envt’l L. 218.

Rubagotti Gianluca. “The Role of NGOs Before the United Nations Human Rights Committee” in Treves Tullio *et al.* eds., *Civil Society, International Courts and Compliance Bodies* (The Hague: T.M.C Asser, 2005) 67.

Sands P.J. "The Role of Non-Governmental Organizations in Enforcing International Environmental Law" in Butler William. ed. *Control Over Compliance With International Law* (Dordrecht: Martinus Nijhoff, 1991) 61.

Schwartz R. & Orleans S. "On Legal Sanctions" in Barkun Michael (ed.), *Law and the Social System* (New York: Lieber-Atherton, 1973) 63.

Shibata Akiho. "The Basel Compliance Mechanism", (2003) 12:2 RECIEL 183.

Singh Dalvinder. "Enforcement Methods and Sanctions in Banking Regulation and Supervision", (2002) 4:4 Int'l Comp. Corp. L. J. 307.

Slaughter A. M. "International Law in a World of Liberal States", (1995) 6 EUR. J. Int'l L. 503.

_____. "International Law and International Relations Theory: A Dual Agenda", (1993) 87 Am. J. Int'l L. 205.

Smith II John Thomas. "The Challenges of Environmentally Sound and Efficient Regulation of Waste: The Need for Enhanced International Understanding" (1993) 5 J. Envt'l . L. 91.

Soroos Marvin S. "Global Institutions and the Environment: An Evolutionary Perspective" in Axelrod et al *Global Environment.*

Tarlock Dan A. "The Role of Non-Governmental Organizations in the Development of International Environmental Law" in Pevato Paula M. ed., *International Environmental Law Volume 1* (England/USA: Dartmouth & Ashgate, 2003) 369.

Thompson Alexander. "Applying Rational Choice Theory To International Law: The Promise and Pitfalls", (2002) 31 J. Legal Studies 285.

Vanderbergh Michael. "Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance" (2003) 22 Stan. Envt'l L.J. 55.

Vespa Matthews. "Climate Change 2001: Kyoto at Bonn and Marrakech", (2002) 29 Ecology L.Q, 395.

Victor David. "Enforcing International Law: Implications For An Effective Global Warming Regime" 10 Duke Envt'l L. & Pol'y F. 147.

Walensteen Peter, Staibano Carina, & Eriksson Mikael. "The 2004 Roundtable on UN Sanctions Against Iraq: Lessons Learned", (Uppsala, Sweden: Uppsala University Department of Peace and Conflict Research, 2005) online: Special

Program on the Implementation of Targeted Sanctions (SPITS) website < http://www.smartsanctions.se/literature/iraqreport_050210.pdf >.

Werksman Jacob. "The Negotiation of a Kyoto Compliance System" in Olav Stokke *et al. Implementing the Climate Regime,* 17.

Wirth David. "Trade Implications of the Basel Convention Amendment Banning North-South Trade in Hazardous Wastes", (1998) 7:3 RECIEL 237.

Wiser Glenn. "Kyoto Protocol Packs Powerful Compliance Punch" (2002) 25:2 Int'l Envt'l Rep. 86 online: CIEL website < http://www.ciel.org/Publications/INER_Compliance.pdf >.

Wiseberg Laurie S. "The Vienna World Conference on Human Rights" in Fawcett Eric & Newcombe Hanna. eds., *United Nations Reform: Looking Ahead After Fifty Years* (Toronto: Science for Peace, 1995), 175.

World Resources Staff, "Stratospheric Ozone Depletion: Celebrating Too Soon", (1998) World Resources 1 online: World Resources Institute Website < http://earthtrends.wri.org/pdf_library/features/cli_fea_ozone.pdf >.

Wouters Jan & Rossi Ingrid. "Human Rights NGOs: Role, Structure and Legal Status", (2001) 14 University of Leuven Institute of International Law Working Paper, online: University of Leuven website < http://www.law.kuleuven.be/iir/nl/wp/WP/WP14e.pdf >, 8.

Young R. Oran. "Negotiating an International Climate Regime: The Institutional Bargaining for Environmental Governance", in Nazli Choucri, *Global Accord,* 431

Newspaper

Paterson Tony. "North-Sea Shell Game: Greenpeace's Campaign Against Oil Multinational Royal Dutch Shell", *The European* June 30-July 6, 1995.

Reports

Report of the Second Meeting of the Conference of Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal March 25, 1994 UNEP/CHW 2/30 online: Basel Convention Website < http://www.basel.int/meetings/cop/cop1-4/cop2repe.pdf >.

Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Fourth Session, Decision 8/CP.4., UN.FCCCOR, 1998, U.N Doc. FCCC/CP/1998/16/Add.1.

Report of the Conference of the Parties on the Second Part of its Sixth Session Held at Bonn from 16 to 27 July 2001, Decision 5/CP.6, UNFCCCOR, 2001, U.N. Doc.FCCC/CP/2001/5.

Report of the Conference of the Parties to the United Nations Framework Convention on Climate Change on its Seventh Session, UNFCCCOR, 2001, U.N Doc. FCCC/CP/2001/13/Add. 1-3.

Report of the Conference of the Parties on its Seventh Session held at Marrakesh from 29 October to 10 November, 2001, January 21, 2002 FCCC/CP/2001/13/Add.3, online: UNFCCC website < http://unfccc.int/resource/docs/cop7/13a03.pdf#page=64 >.

Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal on its Eighth Meeting, (unedited version) UNEP/CHW.8/16, 8th Session November 27 – December 1, 2006, Nairobi, online: Basel Convention website < http://www.basel.int/meetings/cop/cop8/docs/16e-uned.pdf >.

Report of the Regional Workshop Aimed at Promoting Ratification of the Basel Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal Addis Ababa, Ethiopia, August 30-September 2, 2004 UNEP/CHW.7/INF/11.

Report of the Governing Council on the Work of Its Fourteenth Session, GCOR, 2nd Sess., Supp. No. 25, UN Doc. A/42/25 (1987), Dec. 14/30 "Environmentally Sound Management of Hazardous Wastes", online: UNEP website < http://www.unep.org/download_file.multilingual.asp?FileID=28 >.

Other Documents

Bernstorff Andreas & Stairs Kevin. "POPs IN AFRICA: Hazardous Waste Trade 1980-2000 Obsolete Pesticide Stockpiles", a Greenpeace Inventory prepared for the Conference of Plenipotentiaries on the Stockholm Conference on Persistent Organic Pollutants; Stockholm, Sweden, May 22-23, 2001, online: Greenpeace website <

http://www.greenpeace.org/raw/content/international/press/reports/pops-in-africa-hazardous-wast.pdf >.

Basel Secretariat. "Environmentally Sound Management", UNEP General Information Leaflet, online: Basel Convention website < http://www.basel.int/pub/environsound.pdf >.

_________. "Revised Questionnaire on Transmission of Information" online: Basel website < http://www.basel.int/natreporting/ >.

Bayon Ricardo *et al.* "Environmental Funds: Lessons Learned and Future Prospects", online: Strategy guide website < http://www.strategyguide.org/Pdfs/GEF/EnvironmentalFundslessonslearnedandfutureprospects.pdf >.

Canadian Office of Enforcement. "International Commerce in Hazardous Industrial Waste", the Canadian Office of Environment newsletter online: Environment Canada website < http://www.atl.ec.gc.ca/enforcement/hazardous_waste.html >.

CITES Secretariat. "Parties Currently subject to a Recommendation to Suspend Trade" online: CITES website < http://www.cites.org/eng/news/sundry/trade_suspension.shtml >.

________ "What is CITES?", a CITES general information leaflet online: CITES website <http://www.cites.org/eng/disc/what.shtml >.

DEQ. "International Packaging Regulations", online: Department of Environmental Quality website < http://www.deq.state.or.us/wmc/packaging/other/int/pkgregulation.pdf >.

Edie News Centre. "NGOs Accuse Shipping Line of Flaunting International Hazardous Waste Laws" (November 20, 1998), online: Edie newsroom website < http://www.edie.net/news/news_story.asp?id=381 >.

Greenpeace. "Greenpeace Takes French Government to Court for Sending Toxic Ship decision to Turkey" a Greenpeace news release of July 17, 2002.

_______."Greenpeace Intercepts European Ship Attempting to Illegally Dump Toxic Waste in Turkey", a Greenpeace news report, May 4, 2002, online: Greenpeace website < http://www.greenpeace.org/internatioinal/news/greenpeace-activists-have-inte>.

Handbook on Data Reporting Under the Montreal Protocol, online: UNEP website < http://ozone.unep.org/pdfs/Handbook-on-Data-Report-from-UNEP-TIE.pdf >.

INECE. "Monitoring Compliance", an INECE publication online: INECE website < http://www.inece.org/princips/ch6.pdf >.

___________. "New European Enforcement Initiatives Takes Aim at Major Seaports: First Round of Inspections Reveal Illegal Hazardous Waste Shipments", INECE newsletter, 2004, online: INECE website < http://www.inece.org/newsletter/9/enforcement.html >.

_______. "Citizen Enforcement: Tools for Effective Participation", a Capacity Building Support Document for Environmental Compliance and Enforcement Programs delivered at the Fifth International Conference on Environmental Compliance and Enforcement in Monterey, California, USA, November 16-20, 1998, 1.

Isarin Nancy. "New European Enforcement Initiatives Takes Aim at Major Sea Ports: First Round of Inspections Reveal Illegal Hazardous Wastes Shipments", an INECE newsletter, February 2004 newsletter 9, online: INECE website < http://www.inece.org/newsletter/9/enforcement.html >.

Lewenstein Mark. "Your E-Waste's Journey to Africa", a Basel Action Network (BAN) trade news, November 28, 2006 online: BAN website < http://www.ban.org/ban_news/2006/061128_journey_to_africa.html >.

NGO Platform on Shipbreaking, "Star Cruises Ltd. And Norwegian Cruise Lines: Deceiving Germany and Violating International Law in the Export of the SS Norway to India", NGO Platform news report of June 30, 2006, online: BAN website < http://www.ban.org/Library/Star_Cruise_Deception_Report_Final.pdf >.

Rothman John. "Environmental Enforcement Across Borders: Is the US-Mexico Borders an Extreme Case?", an INECE newsletter, available online: INECE website < http://www.inece.org/newsletter/9/enforcement.html > or < http://inece.org/newsletter/9/rothman.pdf >.

Sterling Toby. "Dutch Trafigura Settles Waste Case", *The Associated Press,* February 16, 2007 online: Topix website < http://www.topix.net/content/ap/2693127944189141726739737118801294186336 >.